SUPREME COURT, U. S.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 196[redacted]

No. [redacted] 81

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

vs.

JOHN P. McELROY, T. O. BATTREAL, F. M. BOSTER, J. D. BRIMER, J. D. CAMPBELL, A. A. CAPPER, R. L. CATO, L. A. CHRISMAN, L. R. CLEWIS, J. H. CRAIG, B. DAGGETT, D. E. DWYER, A. G. FISHER, D. M. FORD, J. W. FORSYTHE, O. M. GOLDSMITH, J. D. GUNN, T. F. HAMMONTREE, E. G. HART, J. M. HAY, W. G. HAYES, C. E. HUGHES, J. R. IGGENS, H. R. LAGER, C. M. LEE, J. A. MATHIS, T. C. MAUPIN, R. A. MENSINGER, R. A. NEUPERT, H. P. PARKER, JR., L. C. PAUL, N. A. POSTON, H. G. REESE, R. E. REICH, B. G. REIFSTECK, E. E. REYNOLDS, R. D. RHEINHARDT, L. D. RIPLEY, C. ROBINSON, W. B. ROBINSON, D. D. RUSSELL, G. P. RYAN, R. F. SCHROEDER, D. O. SCHULZ, R. M. SCOTT, C. M. STEVENSON, T. A. SUMMERS, M. THEODORE, P. J. THOMAS, W. P. WHITEHEAD, W. M. WILLIAMS, J. R. WOOD,

and

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit.

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and

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit.

Petitioner, Brotherhood of Locomotive Engineers, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on February 28, 1968.

OPINIONS BELOW.

The opinion of the Court of Appeals is set forth in Appendix A, *infra*, pp. 18-29, and is not yet officially reported. The opinion of the District Court for the Eastern District of Illinois is printed at P.A. 35-38 of appellants'

appendix filed in the Court of Appeals which is part of the certified record accompanying this petition.[1] The District Court's opinion (App. B, *infra*, pp. 30-33) is unreported.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 28, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

The bargaining representative for the craft of locomotive engineers negotiated an agreement providing that all locomotive engineers, desiring representation in disciplinary investigations of conduct while working as an engineer and in the processing of grievances arising out of the collective bargaining agreement for that craft, would be required to be represented by the majority representative in those designated procedures for handling with the railroad officers on the property. A group of engineers, all members of a minority union, sought, but were not permitted, to be represented by the minority union in such proceedings. The Court of Appeals determined that the involved contract provisions were invalid on the basis that the Railway Labor Act confers a right to the individual employee of choosing his own representative in the handling of "minor disputes." The basic question presented is

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[1] The appendices to the briefs submitted to the court below by the Petitioner and the individual Respondents herein have been certified as the record for use with this petition. Since the pages have not been renumbered, references herein are to the original pagination. "P.A." refers to Plaintiffs-Appellants' appendix; and "I.A." to Intervenor-Appellee's appendix filed in the Court of Appeals. The certified record also includes the proceedings in the United States Court of Appeals.

whether the Court of Appeals erred in determining that under the Railway Labor Act an employee has the unqualified privilege to choose a minority union to represent him in the handling of grievances with the railroad under the collective agreement negotiated by the craft representative or in carrier conducted investigations, when those proceedings involve interpretation or application of the collective agreement and when the bargaining representative would not have an opportunity to be present at their adjustment. Ancillary thereto is the question presented whether the majority representative may validly enter into contractual provisions requiring all employees in the craft, who desire representation in the grievance and investigation procedures, be represented by the collective bargaining agent.

STATUTE INVOLVED.

The statutory provisions involved are Sections 2, Second, Third, Fourth, Sixth and 3, First (i) of the Railway Labor Act, as amended (45 U. S. C. §§ 152, Second, Third, Fourth, Sixth and § 153, First (i)), which are set forth in Appendix C, *infra*, pp. 33-35.

STATEMENT.

The Brotherhood of Locomotive Engineers ("BLE") is the duly designated collective bargaining representative under the Railway Labor Act of the employees of the Terminal Railroad Association of St. Louis ("TRRA") in the craft of locomotive engineers. BLE has a collective bargaining agreement with TRRA applicable to and governing the work of locomotive engineers employed by TRRA (P.A. 3).

TRRA is a common carrier by railroad engaged in interstate commerce in Missouri and Illinois and subject to the Railway Labor Act (P.A. 2).[2]

The Brotherhood of Locomotive Firemen & Enginemen ("BLF&E") is the collective bargaining representative for TRRA employees in the craft of locomotive firemen, but for no other craft of employees on TRRA (App. A, p. 18; P.A. 3).

The individual respondents are locomotive engineers employed by TRRA and are members of the minority union, BLF&E (App. A, p. 18; P.A. 7-9). The collective agreement between TRRA and BLE specifies the rates of pay, rules and working conditions to which they, and all other engineers, are subject (P.A. 4).

Locomotive engineers, including the individual respondents, may file grievances and monetary claims with TRRA based on alleged violations by the carrier of the collective agreement with BLE. In addition, locomotive engineers are subject to disciplinary proceedings for alleged improprieties or for failure to discharge duties while working in that capacity (P.A. 4, 6).

The collective bargaining agreement between BLE and TRRA establishes procedures for handling such matters in order to determine the contractual validity of the claims or grievances or the merit of carrier imposed discipline, including discharge. If these matters are not adjusted on the property in the manner designated in the collective bargaining agreement, they may be referred to

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[2] TRRA's operations therefore are within both the Seventh and Eighth Circuits. Although the involved provisions would be invalid under the decision of the Court of Appeals herein, their validity would continue in the Eighth Circuit in view of *Brooks v. Chicago, R. I. & P. R. Co.*, 177 F. 2d 385 (8th Cir. 1949) and *Butler v. Thompson*, 192 F. 2d 831 (8th Cir. 1951).

the National Railroad Adjustment Board (P.A. 4, I.A. 1-4).

On November 15, 1965, BLE and TRRA entered into collective agreement provisions providing that the only representative which a locomotive engineer may have in handling grievances and claims arising under the collective agreement between BLE and TRRA would be a representative of BLE. The agreement further provides that the only representative the employee is permitted to have at an investigation conducted by TRRA to determine whether discipline should be imposed for an act or omission occurring while the employee was working as a locomotive engineer is a representative of BLE. Nothing in the agreement prevents the individual engineer from personally handling the claim or disciplinary proceeding on the property nor from using any representative of his choosing to submit and progress the dispute to the National Railroad Adjustment Board for compulsory arbitration[3] (I.A. 1-4).

Since November 15, 1965, 17 of the individual respondents asserted claims against TRRA, which arose in the course of their employment as engineers. One of these 17 respondents and another individual respondent were involved in accident investigations conducted by TRRA, and still another individual respondent was called as a

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[3] This Court's decision in *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711 (1945), has been construed as holding that the individual employee may through any counsel or representative of his selection submit an unadjusted dispute to the National Railroad Adjustment Board (App. A, p. 23). The agreement involved herein is not contrary to that construction. It also should be noted that the agreement does not prohibit the individual from conferring with management about his grievance (I.A. 2), nor does it assume sole power in the bargaining representative to compromise or settle grievances without regard to the wishes of the employee. Thus, the agreement does not conflict with the opinion in *Burley*, even interpreted in the broadest manner possible.

witness in one of the investigations. All of these individuals designated BLF&E, the minority union, to represent them in these proceedings. Pursuant to its agreement with BLE, TRRA refused to permit the respondents to be represented by an official of BLF&E. TRRA declined to consider appeals filed by BLF&E on the 17 time claims on the basis that the agreement permits only the craft representative, BLE, to represent locomotive engineers in the handling of time claims and grievances based on the BLE negotiated collective bargaining agreement, while those disputes are being handled with the carrier officers (P.A. 7-9).

These 19 respondents, joined by 33 other TRRA locomotive engineers who are also members of BLF&E, brought suit against TRRA claiming that the agreement between BLE and TRRA violated the Railway Labor Act in that it would allegedly tend to coerce them into joining BLE thereby interfering with their membership in BLF&E and asking for an injunction preventing TRRA from complying with said agreement (P.A. 11-12). In effect, respondents sought a judgment requiring TRRA to confer and negotiate with BLF&E, the representative designated by said individuals, in settling grievance and disciplinary matters (App. A, p. 18). BLE was granted leave to intervene (P.A. 34).

TRRA filed a motion to dismiss for failure to state a claim of relief and for want of jurisdiction in that the Adjustment Board has exclusive jurisdiction over the question which presented issues of contract interpretation (P.A. 13-19). BLE's answer (P.A. 27-34) raised the defense of lack of jurisdiction, particularly in the context of a jurisdictional dispute between BLE and BLF&E, in addition to the contention that the complaint failed to allege an actionable claim.

The District Court dismissed for want of jurisdiction (App. B, p. 33). Concluding that judicial relief was warranted under the Railway Labor Act, the Court of Appeals for the Seventh Circuit reversed and remanded directing the District Court to enter judgment for the individual respondents. The Court of Appeals said:

> "Our holding is simply that these plaintiffs, already members of the Firemen's union, can designate that union to represent them on the Terminal property and before the National Railroad Adjustment Board with reference to time claims and disciplinary investigations occurring while plaintiffs performed the services of locomotive engineers.[4]

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[4] The purported factual distinction upon which the opinion below appears to be based is that the respondents herein "ebb-and-flow" between the craft of locomotive engineers and the craft of firemen (App. A, p. 26). Therefore, the opinion at one point recognizes that the court might apparently reach the opposite conclusion if non-operating railroad employees were involved, while at other times, the court below indicates the ruling is applicable to employees in the non-operating crafts and also industries covered by the National Labor Relations Act (App. A, pp. 26, 21-22, 24). However, this finding by the court below is based on the allegations of the complaint, and has no other support in the record. Unless the court below intended to carve an exception in the law for the railroad operating crafts, the applicability of this finding would not be relevant. If pertinent to the final decision, it should be noted that at trial BLE would have shown that on the TRRA there is not and has not been any shuttling back and forth of employees between the crafts of locomotive engineers and firemen for several years, that the respondents are and have been engineers for a number of years, that they have not worked as firemen in many years, and that respondents have seniority ranking making it unlikely that they will ever work as locomotive firemen in the future. These circumstances arise, in part, from the fact that many TRRA firemen are "fixtures," that is have declined promotion as engineers, and hold high seniority ranking as firemen. Therefore, many engineers, having junior standing as firemen, would not be able to return to the ranks of firemen if work were unavailable for them as engineers. But, as a result of this purported distinction, the court appears to indicate that BLE and BLF&E have certain undescribed rights in the respective crafts for which each is not majority representative (App. A, pp. 28-29).

To that extent, Articles 34 and 35 of the Terminal-Engineers contract of November 15, 1965 are invalid, but our judgment does not bar the Engineers' union from discussions on the Terminal property or before the National Railroad Adjustment Board when its interests are involved." (App. A, p. 28.)

REASONS FOR GRANTING THE WRIT.

This case raises the question specifically reserved by this Court in *General Committee v. Southern Pacific Co.*, 320 U. S. 338, 344 (1944), as to whether an employee has the unlimited "privilege" to choose any person or union to represent him in the prosecution of claims or grievances with his employer. The Court of Appeals held that the Act grants an employee the unqualified "right"[5] to that choice and, therefore, the majority representative cannot validly contract to itself exclusive representation in the handling of grievance and disciplinary matters before railroad officials. This ruling is important not only to BLE, as the designated bargaining representative of locomotive engineers on TRRA and most of the nation's major railroads, but extends to grievance handling by other railroad bargaining representatives[6] and by collective bar-

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[5] The court below dealt with the problem as involving substantive rights of the individuals, but, in actuality, the case concerns a privilege in the sense the term was employed by this Court in the *Southern Pacific* case. The distinction is probably critical in answering the ancillary question whether the bargaining representative may contract for the legal right to enforce the substantive obligations of the collective agreement in the negotiation of grievances on the property. See Cox, *Rights Under A Labor Contract*, 69 HARV. L. REV. 601, 624 (1956).

[6] On the basis of the best information available to BLE, it appears that in the operating crafts alone, there are about 24 "exclusive representation" agreements with provisions like the involved clauses (I.A. 1-4). BLF&E holds 5 of these agreements. Also, many prevailing agreements restrict representation on the basis of employment with the carrier or on some comparable criteria.

gaining agents in general.[7] The ruling below has additional significance relative to the relationships between those unions which represent the operating crafts in the railroad industry due to the radical changes in the industry which in turn reflect on the status of the various craft representatives—especially locomotive engineers and firemen.

The court's ruling, we submit, is based on the erroneous determination that collective bargaining is limited to negotiation and execution of the basic labor contract, and that, therefore, individual action in the context of grievance handling cannot interfere with the collective bargaining process. It is thus concluded that the majority representative loses its exclusive authority over that agreement once executed. The court's ruling not only conflicts with its previous decisions and those of other circuits, but violates the basic purposes of the Act by negating the authority of the bargaining agent in maintaining intact the labor contract throughout its term. By erroneously finding a statutory purpose of encouraging and, indeed, fostering substantial minority enclaves with-

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[7] The provisos contained in Section 9(a) of the National Labor Relations Act, 29 U. S. C. § 159(a), have been construed to confer a right to minority union representation in grievance matters. *Douds v. Local 1250*, 173 F. 2d 764, 772 (2d Cir. 1949). However, the question herein has not been determinatively resolved under that Act in view of the continuing stature of *NLRB v. Hughes Tool Co.*, 147 F. 2d 69 (5th Cir. 1944). The ruling below would provide additional support for *Douds*, although the latter case has been severely criticized. Sherman, *The Individual and His Grievance—Whose Grievance Is It?*, 11 U. PITT. L. REV. 35, at 38, 55 (1949). While the ruling below used *Douds* as authority, the applicability hereto is questionable, since comparable provisions restricting intervention of the bargaining representative in the adjustment of grievances cannot be found in the Railway Labor Act. However, the ruling below would accord the same privileges to the individual governed by the Railway Labor Act without the two specific statutory safeguards provided in the National Labor Relations Act for the protection of the collective bargaining agreement and the group interests.

in the bargaining unit, the court determined that the Act contains an explicit command or right in the individual to select a minority union to submit and prosecute grievances and other matters pertaining to the collective agreement belonging to the majority representative. This determination is disruptive of peaceful and meaningful labor relations, the absolute foundation of the Act.

1. As the above statement indicates, one of the fundamental errors in the decision of the court below lies in the failure to recognize the continuing nature of collective bargaining, the primary purpose for which the bargaining representative exists. In recognizing that grievance disposition is collective bargaining, this Court has said:

> "Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract." *Conley v. Gibson,* 355 U. S. 41, at 46 (1957).

In *Republic Steel Corp. v. Maddox,* 379 U. S. 650, at 653 (1965), the Court once again stated:

> "Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees."

As a result of the continuing nature of collective bargaining whereby the handling and adjustment of grievances creates precedent which may prejudice later grievances, may nullify the meaning of specific contractual provisions, or may clarify ambiguities or fill gaps in the labor

contract, it has been advocated that the collective bargaining representative should have complete control of grievances, subject to its duty of fair representation. Cox, *Rights Under A Labor Agreement*, 69 HARV. L. REV. 601, at 625-38 (1956). Apparently accepting the concept that the employer may promise to give the union the only legal right to compromise or enforce substantive obligations under the collective agreement, through the contract grievance procedures, this Court in *Republic Steel Corp. v. Maddox, supra,* at 652-53, went further in saying: "But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf." In the instant case, all the majority union assumes through the involved agreement is to be afforded the opportunity to progress those grievances arising under the collective bargaining agreement it negotiated with management. However, the ruling below denies the majority representative the power to contract for the limited right of exclusive representation, which it would already apparently possess as the duly accredited bargaining representative, thereby conflicting with the above pronouncements of this Court.

The court below, however, expresses the view that members of a minority union can only be properly and adequately represented by the rival minority union. If this theory had some basis in the early development of labor law, it is no longer valid and would now appear to be in conflict with this Court's holdings that the majority representative has a statutory duty to fairly represent all persons in the craft, including nonmembers or members of another union.[8] *Vaca v. Sipes,* 386 U. S. 171 (1967).

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[8] The expressions of the court below apparently stem from the Seventh Circuit's refusal to accord the hostile discrimination doctrine the wide scope intended by this Court. See *Pickett v. New York Central R. Co.,* 332 F. 2d 968 (7th Cir. 1964).

Most importantly, by assuming that collective bargaining terminates with execution of the basic contract, the ruling below accords a minority union the right to negotiate on the terms and provisions of that contract in the context of grievance handling. Not only can this lead to inconsistencies in the coliective agreement, it serves to minimize the effectiveness of the bargaining representative and weaken its influence as craft representative. In short, this view which permits the minority union to negotiate with the railroad conflicts with the basic command of the Act that the carrier shall meet and treat with the accredited representative and no other. *Virginian Ry. Co. v. System Federation,* 300 U. S. 515 (1937).

To disregard the needs of the majority of employees in the bargaining unit in having the craft representative maintain the collective agreement and to find an explicit command in the Act creating the right to select minority union representation on the basis that the individual employee may belong to the minority union defies logic and violates the basic purposes of the Act and conflicts with the interpretations of the statutory commands enunciated by this Court.

2. Further, the decision below cannot be reconciled with previous decisions of the Seventh Circuit in *Broady v. Illinois Central R. Co.*, 191 F. 2d 73 (1951), *cert. den.*, 342 U. S. 897 (1951), and *Edwards v. St. Louis-San Francisco R. Co.*, 361 F. 2d 946 (1966), nor with those decisions of the Eighth Circuit in *Brooks v. Chicago, R. I. & Pac. R. Co.*, 177 F. 2d 385 (1949), and *Butler v. Thompson,* 192 F. 2d 831 (1951). The court below improperly limits those decisions by considering them as not involving the situation of employees shuttling back and forth be-

tween crafts (App. A, pp. 26, 28),[9] or concerning an employee seeking representation by a rival union not having a collective bargaining agreement, or challenging the grievance procedures after the Adjustment Board has rendered an interpretation. Those distinctions, however, fail to perceive that in each of the preceding cases the fundamental questions of whether the individual employee has an unqualified right to choose a representative in grievance proceedings on the property and whether, therefore, the majority representative could limit that selection by contract had to be determined prior to reaching the decisions therein.[10] Thus, the propriety of the interpretation of the relevant provisions of the Act set forth in the ruling below warrants review by this Court. In view of the number of cases relating to the basic question of law involved and the inconsistency between these opinions and the ruling herein, there is a clear need for a determinative answer to that question.

3. One of the major purposes of the Act was to reduce or eliminate turmoil and agitation on union matters among railroad employees.[11] The ruling below neverthe-

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[9] See fn. 4, *supra*. Whatever significance this distinction may have to the decision is unknown, for elsewhere in its opinion the Court below indicates that all railroad employees have the right to be represented by minority unions in grievance matters (App. A, p. 21). Thus, those employees in the non-operating crafts, where there is no "ebb-and-flow" between crafts, would also have the right to use a minority union to negotiate on grievances.

[10] See also *D'Elia v. New York, N. H. & H. R. Co.*, 230 F. Supp. 912 (D. Conn. 1964), *aff'd*, 338 F. 2d 701 (2d Cir. 1964), *cert. den.*, 380 U. S. 978 (1965).

[11] Although concerned with the 1951 union shop amendments, the merit and forcefulness of that purpose was laudably expressed in Hearings on H. R. 7789 before Committee of Interstate and Foreign Commerce, 81st Cong. 2d Sess. 11, 22-23 (1950).

less interprets the Act as containing a judicially enforceable explicit command or legal right allowing the employee to select a minority union as his representative in the grievance and investigative procedures with the rail carriers. Therefore, the court views the Act as permitting and encouraging the establishment and continued existence of substantial minority enclaves within the craft.

In support of these expressions, the opinion below twice refers to the union shop provisions contained in Section 2, Eleventh (c) of the Act as establishing the Congressional purpose of fostering minority unions in the railroad operating crafts, a purpose expressed 17 years after passage of the basic Act which was intended to strengthen majority unions and collective bargaining (App. A, pp. 26, 28-29). Upon that basis, the court was persuaded to declare that a locomotive engineer may satisfy the membership requirements of a union shop agreement by belonging to BLF&E, and, in turn, should have the right to designate BLF&E as his representative in grievance proceedings. From these premises, the court concluded that Section 2, Eleventh (c) would be rendered a nullity if BLE's contractual provisions were held valid. That conclusion does not follow.

Nevertheless the necessity of these comments is unclear, because as previously indicated the ruling below extends to the nonoperating crafts and also to collective bargaining agents under the National Labor Relations Act, neither of which are concerned with Section 2, Eleventh (c). In addition, basing the ruling below in part upon the union shop amendments is erroneous, for those provisions do not deal in any manner with representation in disciplinary investigations required by the collective agreement or in the prosecution of grievances. Furthermore, *Pennsylvania R. Co. v. Rychlick*, 352 U. S. 480 (1957), cited by

the court below, is scant authority for the effectiveness of that argument to the question here, since this Court stated that the only purpose of Section 2, Eleventh (c) was a very narrow one, "simply to solve the problem of intercraft mobility under railroad union-shop contracts." *Id.* at 494.

The pronouncements by the Court of Appeals are an extension of its recent expressions on the subject of minority unions in the railroad operating crafts with respect to union shop agreements. *Birkholz v. Dirks*, ___ F. 2d ___ (7th Cir. 1968).[12] It is submitted that case was incorrectly decided because the court misapplied the precepts of *Rychlick*. But even if that ruling were correct, it has no relevancy to the instant question. If no union shop agreement were in effect, the employee could belong to a minority union or no union. Yet, this would not negate the majority representative's authority to negotiate an exclusive representation rule for on property handling of grievances. Taken to its logical conclusion, the ruling below would have that improper effect in the described situation.

Further, the court below failed to perceive that furthering minority unions through use of the grievance procedures effectively undermines the "representative's performance of its functions under the Act." *International Association of Machinists v. Street*, 367 U. S. 740, at 754 (1961). Denying the majority representative power to

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[12] In *Birkholz*, the Seventh Circuit determined that a railroad employee in the operating crafts can satisfy the membership requirements of a union shop agreement by belonging to any one of the five operating craft unions. Thus, an engineer could belong to any of these unions and, under the ruling below, would be entitled to representation by it in grievance matters. Taken together, the two cases effectively fragmentize collective bargaining and representation in the railroad operating crafts.

control the presentation of grievances and thus to control the interpretation and application of the collective agreement offers dissident groups, belonging to rival unions, the opportunity to use the grievance procedures as a vehicle for competition and a means to foster employee dissatisfaction instead of a method of eliminating it. Competition of this nature can deter the bargaining representative from taking responsible positions. Furthermore, the determination by the court below overlooks the group interests of the employees who have chosen the majority representative, their future interests as shaped through the law-making aspects of grievance adjustments, and the present interests of all employees in the group having similar grievances who may gain or lose by the adjustment of the individual's grievance through an improper interpretation or application of the collective agreement.

The clarification of the fundamental rights of the majority representative and the employees as a group and the privileges of the individual employee in this process is an issue of general importance in the administration of the Act and of meaningful labor relations. This case is an appropriate vehicle for the Court to consider and discuss that important issue.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

(February 28, 1968.)

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and CUMMINGS, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. Plaintiffs are 52 employees of the Terminal Railroad Association of St. Louis ("Terminal") and are members of the Brotherhood of Locomotive Firemen and Enginemen ("Firemen"). Terminal is a switching terminal serving 14 trunk-line railroads in the St. Louis area. It is a common carrier by railroad and subject to the Railway Labor Act (45 U.S.C. § 151 *et seq.*). The complaint alleges that Terminal violated the Railway Labor Act by entering into a November 15, 1965, agreement with the Brotherhood of Locomotive Engineers ("Engineers"), providing that employees working as locomotive engineers must be represented exclusively by the Engineers' union as to grievances processed on the Terminal Railroad, even though the particular employees are members only of the Firemen's union and wish to be represented by that union. Relying on certain provisions of the Railway Labor Act, plaintiffs in effect are seeking a judgment that would require Terminal to confer and negotiate with the Firemen, the representative designated by plaintiffs, in settling grievance and disciplinary matters.

Plaintiffs began their employment with Terminal as locomotive firemen, and their rates of pay, rules of employment and working conditions were established pursuant to collective bargaining agreements between the Firemen and Terminal. They were later promoted to locomotive engineers and have seniority status in both crafts. They shuttle back and forth between the two crafts, depending upon the needs of Terminal. When their seniority stand-

ings on the engineers' seniority roster are insufficient to permit their continuing work in that craft, they work in the craft of locomotive firemen. When they work as firemen, the collective bargaining contract between the Firemen and Terminal establishes the applicable rates of pay and working conditions; when they work as engineers, the bargaining contract between the Engineers and Terminal governs such matters.

While 17 of the plaintiffs were working as locomotive engineers, they filed time claims with Terminal. These claims were denied at the initial level on Terminal's property. Thereafter, the Firemen's union appealed the claims to Terminal's General Superintendent and then to its Manager of Labor Relations. These officials denied the appeals on the ground that the November 15, 1965, agreement between Terminal and the Engineers permits only the Engineers' union to represent locomotive engineers in the handling of time claims and grievances.

One of said 17 plaintiffs and another plaintiff were involved in accident investigations conducted by Terminal, and still another plaintiff was called as a witness in one of the investigations, but Terminal refused to permit them to be represented by the Firemen because of the November 15, 1965, agreement between Terminal and the Engineers.

These 19 plaintiffs were joined in the litigation by 33 other employees of Terminal who are also members of the Firemen and sometimes work as locomotive engineers. All 52 asked the District Court to void Articles 34 and 35 of the November 15, 1965, Terminal-Engineers' contract as violative of the Railway Labor Act.

Prior to the November 15, 1965, agreement between Terminal and the Engineers, the railroad had for many years permitted locomotive engineers who were members of the Firemen to be represented by that union for the purpose of settling their grievance or disciplinary problems

on the property. Subsequently, Terminal has refused to permit the Firemen's union to handle such matters. The reason for this refusal is that Article 34 of the November 15, 1965, agreement between the Engineers and Terminal limits the representation of individual locomotive engineers in the handling of time claims or grievances to the Engineers' union, and Article 35 similarly permits only the Engineers' union to represent individual engineers during the investigation of cases involving their suspension or dismissal.

The District Court permitted the Engineers to intervene and subsequently dismissed the action, holding that the National Railroad Adjustment Board has exclusive jurisdiction over this type of controversy. Concluding that judicial relief is warranted under the Railway Labor Act, we reverse.

This case presents for decision the question left open in *General Committee v. Southern Pacific Co.*, 320 U.S. 338, 344, namely, whether an employee's assertion of "the privilege of choosing his own representative for the prosecution of his [grievance] claims" under the Railway Labor Act is justiciable. Two courts of appeals and then Attorney General Tom C. Clark have ruled that he has such a privilege,[1] and we agree with their conclusions. Because there is such a privilege, federal court jurisdiction follows.

Ever since *Texas and New Orleans R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548,[2]

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[1] *Estes v. Union Terminal Co.*, 89 F.2d 768, 770 (5th Cir. 1937); *General Committee v. Southern Pacific Co.*, 132 F.2d 194 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U.S. 338; 40 Op. A. G. 949 (1946).

[2] This holding was justified by H. R. Rep. No. 328, 69th Cong., 1st Sess., pp. 1-2, where the House Committee on Interstate and Foreign Commerce expressed the desirability of judicial aid to settle questions under the Railway Labor Act.

the federal courts have consistently held that Congress intended them to enforce the commands of the Railway Labor Act.[3] Therefore, if the Railway Labor Act accords these plaintiffs the right to designate the Firemen's union as their representative for settling grievances, the District Court did have jurisdiction to award appropriate relief unless jurisdiction over this dispute has been granted exclusively to the National Railroad Adjustment Board.

The Railway Labor Act has divided disputes between carriers and their employees into two classes. The major disputes concern the making and maintaining of collective bargaining agreements, whereas the minor disputes concern grievances and contract interpretation or application questions.[4] Of course, as to major disputes, it is unquestioned that the Engineers' union is exclusively entitled to represent the plaintiffs, when working as locomotive engineers, by virtue of Section 2 Ninth of the Railway Labor Act. See *Virginian Railway v. System Federation No. 40*, 300 U.S. 515.

Section 2 Second of the Railway Labor Act provides that all disputes shall be considered "in conference between *representatives designated* and authorized so to confer, respectively, by the carrier or carriers and *by the employees* thereof interested in the dispute" (45 U.S.C. § 152 Second; italics supplied). On its face, this provision guarantees an individual employee the right to prosecute his grievances through any representative he may designate. This reading of Section 2 Second is buttressed by the

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[3] *Virginian Railway v. System Federation No. 40*, 300 U.S. 515; *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192; *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768; *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30; *Felter v. Southern Pacific Co.*, 359 U.S. 326.

[4] *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30, 33.

legislative history of the Railway Labor Act of 1934. In the House hearings, both Commissioner Eastman and George Harrison, the spokesman for the standard railroad labor unions, expressed the view that railroad employees have the right to be represented by minority unions in grievance matters.[5] This construction is consonant with other provisions of the Railway Labor Act. Thus Section 2 Third permits employees and carriers to designate representatives without interference from either side, and the representatives of the employees need not even be employees of the carrier. Section 2 Fourth permits individual employees or their local representatives to confer with management during working hours without loss of time.[6] As to minor disputes, Section 2 Sixth provides that the designated representatives of the employees and carriers have the duty to specify the time and place for a conference within ten days after receipt of notice. In Section 3 First (j), Congress concededly granted employees the right to choose any representatives to act on their behalf in handling minor disputes before the National Railroad Adjustment Board. This is also indicative of a similar Congressional intent as to the preliminary negotiations with the carrier.

The provisions in Section 3 First (i) that minor disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" is pertinent too. Admittedly, it was the customary practice on the Terminal for

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[5] Hearings of House Committee on Interstate and Foreign Commerce (73rd Cong., 2d Sess.) on H. R. 7650, pp. 44, 89.

[6] In *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 331, the Court recognized that the commands of Sections 2 Third and 2 Fourth are judicially enforcible. As to Section 2 Second, a similar indication appears in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 200.

a fireman working as a locomotive engineer to select the Firemen's union as his representative for grievance purposes. The Congressional approval of the "usual manner" of handling grievances shows that the Railway Labor Act was not intended to thwart the established practice in this respect.

Besides the foregoing statutory provisions, the landmark case of *Elgin, Joliet and Eastern Railway Co. v. Burley*, 325 U.S. 711, sheds light on this problem. There it was determined that individual employees have the right to present their grievances to the National Railroad Adjustment Board. The Court held that "the individual employee's rights cannot be nullified merely by agreement between the carrier and the union. They are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf." 325 U.S. at p. 740, note 39.[7] Under that interpretation of the Railway Labor Act, it is clear that the Terminal and Engineers cannot nullify these plaintiffs' rights to select the Firemen's union as their representative for grievance purposes. The *Burley* case teaches that individual rights of employees, such as those advanced here, cannot be nullified unless Congress clearly intended such consequences (325 U.S. at pp. 733-734). No such intent is expressed by the language of the Railway Labor Act. In fact, as seen, the statutory language supports plaintiffs.

In *Burley*, it was noted that the individual employee's ideas of appropriate settlement might differ from the union's, so that an individual employee should be permitted to reject a union settlement of a minor dispute unless he had authorized the union to represent him

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[7] The importance of individual choice was also stressed in *Felter v. Southern Pacific Co.*, 359 U.S. 326, 333-334, when dealing with Section 2 Eleventh (b) of the Act.

(325 U.S. at p. 736). Similarly, if, as here, individual employees do not care to be represented by the majority union in the processing of minor disputes, they should be able to choose their own union for that purpose. Judge Learned Hand so recognized under the Labor Management Relations Act in *Douds v. Local 1250*, 173 F.2d 764, 772 (2d Cir. 1949):

> "There only remains the question whether an individual employee or a minority—a 'group'—must negotiate the adjustment of their 'grievance' without the help of a union which it has been their custom to use as their representative. We have little to add to what we said before. Behind the whole Act, indeed, its main presupposition, is the assumption that in industrial negotiations an individual, or a minority, does not bargain on equal terms with an employer. It is not reasonable to suppose that Congress, after giving a minority this privilege, should wish to deprive it of that means of exercising it, which for this reason is the putative condition of its effective use." [8]

Likewise, in *General Committee v. Southern Pacific Co.*, 132 F.2d 194, 198 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U.S. 338, the court pointed out the injustice of having one union represent inter-craft employees, some being members of another union, with rival seniority claims. The court observed that "confidence and trust necessary between a suitor and his representative" would be absent if the employees were required to be represented by unions of which they were not members.

Terminal and the Engineers urge that the National Railroad Adjustment Board has exclusive jurisdiction

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[8] In *Douds*, Judge Hand approved of and followed Attorney General Tom C. Clark's opinion that the Railway Labor Act invalidates a collective bargaining agreement that prevents an individual from negotiating with the carriers through his own union representative in settling grievances. See 173 F.2d at p. 773.

to determine the validity of the clauses in the Terminal-Engineers contract making the Engineers' union the exclusive representative of locomotive engineers in settling grievances and disciplinary matters. However, the Supreme Court has decided that contract validity questions are for the courts and not for the Adjustment Board. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 774; *Felter v. Southern Pacific Co.*, 359 U.S. 326, 327, note 3. As in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 205, the Adjustment Board will not give the relief sought here,[9] so that judicial intervention is necessary.

In an effort to show that the courts have no jurisdiction of this controversy, the Terminal and Engineers lean heavily on *General Committee v. Southern Pacific Co.*, 320 U.S. 338. There the Engineers' union sued for a declaratory judgment that the collective bargaining agreement between the Firemen's union and the Southern Pacific Railway was invalid because it permitted engineers belonging to the Firemen's union to have that union represent them in the handling of their grievances. Following two opinions handed down the same day,[10] the Court concluded that Congress left such "jurisdictional controversies between unions to agencies or tribunals other than the courts" (at p. 344). The dispute there was a pure jurisdictional dispute because the agreement in question did not detract from possible employee rights, but

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[9] See *General Committee v. Southern Pacific Co.*, 132 F.2d 194, 201 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U.S. 338; *United Railroad Workers of America v. Atchison, Topeka & Santa Fe R. Co.*, 89 F.Supp. 666, 668 (N.D. Ill. 1950); *Switchmen's Union v. Louisville & Nashville R. Co.*, 130 F.Supp. 220, 223-224 (W.D. Ky. 1955).

[10] *Switchmen's Union v. National Mediation Board*, 320 U.S. 297; *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323.

adversely affected only the Engineers' union. Here the individual plaintiffs who work as engineers are adversely affected by the Terminal-Engineers' contract. The question of their right to judicial relief was not involved in the *Southern Pacific* case and was expressly left open (*ibid.*). The Supreme Court's decision in the related *M-K-T* case recognizes that federal courts do have jurisdiction to enforce the commands of the Railway Labor Act (320 U.S. at pp. 329-331), and there is such a command here.

At the oral argument, the Engineers' union admitted it could sue Terminal for breach of contract if Terminal allowed the Firemen's union to represent plaintiffs in these minor disputes. In such a suit, Terminal could raise the invalidity of Articles 34 and 35 as a defense, rendering the issue justiciable. To our mind, Congress certainly did not intend the unfair result of making this question of justiciability depend solely on the carrier's unilateral decision as to whether or not to abide by its contract.

Terminal and Engineers rely on *Broady v. Illinois Central R. Co.*, 191 F.2d 73 (7th Cir. 1951), certiorari denied, 342 U.S. 897; *Edwards v. St. Louis-San Francisco R. Co.*, 361 F.2d 946 (7th Cir. 1966); *Brooks v. Chicago, Rock Island & Pacific R. Co.*, 177 F.2d 385 (8th Cir. 1949), and *Butler v. Thompson*, 192 F.2d 831 (8th Cir. 1951). Those cases did not involve the unique situation presented here where employees shuttle back and forth between their crafts. Here, by virtue of Section 2 Eleventh (c) of the Railway Labor Act, the plaintiffs have the right to maintain their membership in the Firemen's union even while working as engineers. See *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480; *Birkholz v. Dirks*, ____ F.2d ____ (7th Cir. 1968).

In *Broady*, the employee sought to be represented not by a union with a collective bargaining contract with

the railroad, but by a "rival union."[11] *Broady* is not determinative, for this Court did not construe Section 2 of the Railway Labor Act nor discuss the *Burley* case, and Section 2 Eleventh (c) of the Act was not brought to the Court's attention. Since the *Howard* and *Felter* cases had not yet been decided (*supra*, p. 7), one basis for the *Broady* decision was apparently the then prevalent notion that the federal courts had no jurisdiction to pass upon this kind of controversy; the same is true with respect to *United Railroad Workers v. Atchison, Topeka & Santa Fe R. Co.*, 89 F.Supp. 666 (N.D. Ill. 1950). It and *Butler* and *Roberts v. Thompson*, 107 F.Supp. 775 (E.D. Ark. 1952), are likewise distinguishable because they are "rival union" cases. The Terminal and Engineers rely too on *Switchmen's Union v. Louisville & Nashville R. Co.*, 130 F.Supp. 220 (W.D. Ky. 1955), but that opinion was based on the *Broady* and *United Railroad Workers* cases, neither of which is dispositive of the problem at hand.

Edwards did not involve the question whether employees are entitled to be represented by unions of their own choice in grievance matters. The principal question involved was an interpretation of Article 40 of the collective bargaining agreement between the Order of Railway Conductors & Brakemen and the Frisco, a question committed exclusively to the National Railroad Adjustment Board under *Order of Railway Conductors v. Pitney*, 326 U.S. 561, and *Slocum v. Delaware, Lackawanna & Western R. Co.*, 339 U.S. 239.

Edwards and *Brooks* and other cases on which the

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[11] The term "rival union" as used herein excludes those unions defined in Section 2 Eleventh (c) of the Railway Labor Act and qualified by the National Mediation Board.

Terminal and Engineers rely[12] involve efforts of an employee to set aside an unfavorable grievance decision by challenging the procedures through which it was reached. Such efforts are frowned upon by the courts, for grievance procedures are supposed to be a substitute for litigation. The instant plaintiffs are not trying to overturn unfavorable grievance decisions, so that appellees' cases challenging grievance decisions are not controlling.

It is unnecessary to decide whether the Railway Labor Act would entitle plaintiffs to designate a minority union seeking to dislodge Engineers' union. Our holding is simply that these plaintiffs, already members of the Firemen's union, can designate that union to represent them on the Terminal property and before the National Railroad Adjustment Board with reference to time claims and disciplinary investigations occurring while plaintiffs performed the services of locomotive engineers. To that extent, Articles 34 and 35 of the Terminal-Engineers contract of November 15, 1965, are invalid, but our judgment does not bar the Engineers' union from discussions on the Terminal property or before the National Railroad Adjustment Board when its interests are involved.

Finally, it should be noted that our holding does not encourage the formation of a new minority union. *Cf. Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480. The Firemen's union was long established as the authorized bar-

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[12] *D'Elia v. New York, New Haven & Hartford R. Co.*, 230 F.Supp. 912 (D. Conn. 1964), affirmed, 338 F.2d 701 (2d Cir. 1964), certiorari denied, 380 U.S. 978; *D'Amico v. Pennsylvania R. Co.*, 191 F.Supp. 160 (S.D.N.Y. 1961), and *Brooks* concerned the alleged right to counsel during grievance proceedings on the railroad property and not the question whether employees have the statutory right to be represented in minor disputes by their union.

gaining representative of these plaintiffs and, as noted, is within the protection of Section 2 Eleventh (c) of the Railway Labor Act. These two unions have lived together and with railroad employers for a long time. To allow the Firemen's union to continue to represent its members in grievance matters would hardly change the balance of power and certainly would not inject a new union into the situation. *Cf. Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480. Section 2 Eleventh (c) of the Act provides that an employee need belong only to one union. Logically, that union should have the right to represent him in grievance proceedings. If appellees were to prevail, Section 2 Eleventh (c) would be rendered a nullity as to these plaintiffs. The "membership" conferred by that Section would, for them, be a naked legal right unaccompanied by any of the ordinary material benefits of belonging to a union. Although our decision means that members of the Firemen's union may have their union represent them in grievances arising while they work as engineers, it also means that members of the Engineers' union have the right to be represented by that union in grievances while they work as firemen. Thus, our decision puts the two unions on a parity with each other and should not cause defections in either direction. In contrast, the effect of the November 15, 1965, agreement between Terminal and the Engineers would discourage membership in the Firemen's union by making it impossible for plaintiffs to be represented by that union in minor disputes.

The judgment is reversed and the cause is remanded with directions to enter judgment for plaintiffs in conformity with this opinion.

APPENDIX B.

OPINION OF THE DISTRICT COURT.

(Filed Jan. 13, 1967.)

Juergens, Chief Judge

Plaintiffs filed their suit, alleging jurisdiction under Title 28, Sections 1331 and 1337, and the Railway Labor Act, Title 45, Section 151, et seq.

Generally stated, the complaint alleges that defendant is a corporation organized under the laws of the State of Missouri and is engaged in conducting railroad operations and is engaged in interstate commerce; that plaintiffs are employees of defendant; that they began their employment as locomotive firemen and have subsequently qualified as locomotive engineers; that locomotive engineers employed by defendant are represented, for the purposes of the Railway Labor Act, by a railway labor organization known as the Brotherhood of Locomotive Engineers (BLE), which union has from time to time negotiated collective agreements with the defendant for the purpose of establishing rates of pay, rules, etc., governing employment of locomotive engineers on the defendant railroad; that due to seasonal, economic and other considerations, the amount of traffic handled and the switching services performed by the defendant varies from time to time and the number of locomotive engineers and locomotive firemen needed by defendant to perform its services varies; that to meet the varying needs for engineers and firemen, there have been established an engineers' schedule agreement and a firemen's schedule agreement, which contain uniform and reciprocal rules and conditions that enable the employees comprising the firemen's craft and the employees comprising the engineers' craft to shuttle back and forth between the two crafts; that when the plaintiffs

are working as firemen, their employment is governed by the rules contained in the firemen's schedule agreement, and when employed as engineers, the rate of pay, rules and conditions are governed by the engineers' schedule agreement; that in the course of plaintiffs' employment as engineers, grievances and time claims frequently develop and become the subject of disputes; that the grievances and claims are normally presented to defendant's operating officials and are processed in negotiations with defendant's representatives or sometimes presented to the National Railroad Adjustmeent Board; that prior to November 15, 1965, grievances and claims arising while plaintiffs worked as engineers were subject to the terms and conditions of the engineers' schedule agreement and were customarily presented to the defendant and processed by a representative of the railway labor union of which plaintiffs were members, whether the union be the BLE or other railway labor unions; that on November 15, 1965, the defendant and the BLE entered into an agreement which compelled plaintiffs and other employees of defendant in positions similar to plaintiffs to select only the BLE to be plaintiffs' representative for the purpose of processing and seeking settlement of grievances developing while plaintiffs are employed as locomotive engineers; that subsequent to entering into the agreement, plaintiffs have had claims develop while working as locomotive engineers and have requested the representative of a railway labor organization other than the BLE to process and seek a satisfactory settlement of the claims with the defendant; that the claims were denied; thereafter, the representative of a railway labor union of which claimants are members appealed the claims to defendant's General Superintendent who declined to consider the claims for the reason that the agreement concluded by

the defendant and BLE permits an individual engineer to be represented in the handling of claims or grievances only by that union; that the claims were subsequently appealed to defendant's Manager of Labor Relations and were again denied for the same reason. Plaintiffs seek to have this Court adjudge that the agreement of November 15, 1965 violates the duty imposed upon the carriers by the Railway Labor Act and that by entering into the agreement defendant violated plaintiffs' rights under the Railway Labor Act.

The BLE has filed its motion to intervene as a defendant. The Court has considered the motion and finds that it is well taken. An order will be entered joining the Brotherhood of Locomotive Engineers as a party defendant.

The original defendant and the intervening defendant have both filed motion to dismiss, alleging, among other things, that this Court lacks jurisdiction to entertain the cause of action here presented in that the Railway Labor Act makes provisions for the dispositions of matters presented and provides administrative remedy which gives exclusive jurisdiction for the hearing and settlement of disputes of the type here involved.

The United States District Court for the Western District of Kentucky had for consideration in *Switchmen's Union v. Louisville and Nashville R. Co.*, 130 F. Supp. 220, a matter quite similar to the one presented here. Chief Judge Shelborne in a very thorough manner examined the matters presented and found that the Court had no jurisdiction to entertain the cause, finding that administrative remedies provided exclusive jurisdiction. The reasoning and conclusion reached in Switchmen's Union (*supra*) are equally applicable to the factual situation presented here.

The complaint and cause of action will be dismissed for want of jurisdiction.

WILLIAM G. JUERGENS,
Chief Judge.

Dated: June 12, 1967.

APPENDIX C.

STATUTES INVOLVED.

Title 45 U. S. C.

§ 152.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of em-

ployees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so

specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

§ 153, First.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

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SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted] 128

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, et al.,
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

Petitioner, Terminal Railroad Association of St. Louis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on February 28, 1968. The Brotherhood of Locomotive Engineers has also sought such review in Docket No. 1417. The original transcript of record in this case has been filed with the Clerk of the Court in Docket No. 1417.[1]

[1] The appendices to the briefs submitted to the Court below by the petitioner and the individual respondents have been certified as the record for use with this petition. The pages have not been renumbered. "P. A." refers to plaintiffs-appellants' appendix. "Appendix" refers to the appendices in this petition. The certified record also includes the proceedings in the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the District Court, set forth in Appendix A hereto, is not reported. The opinion of the Court of Appeals for the Seventh Circuit, set forth in Appendix B hereto, is not yet officially reported, but is unofficially reported at 67 L. R. R. M. 2681.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 28, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Must a railroad whose locomotive engineers have duly designated one union as their collective bargaining representative meet and treat with a rival minority union to adjust grievances of employees in the engineers craft simply because a few individual employees desire the minority union to represent them?

2. Does the Railway Labor Act contemplate and provide that the exclusive role of the collective bargaining agent of a craft necessarily includes the adjustment of grievances?

STATUTES INVOLVED.

Set forth in Appendix C hereto are Sections 2 Second, Third, Fourth, Sixth, and Ninth of the Railway Labor Act (45 U. S. C. 152, Second, Third, Fourth, Sixth and Ninth).

STATEMENT OF THE CASE.

A majority of the members of the craft of locomotive engineers on the Terminal Railroad Association of St. Louis (TRRA) have duly selected the Brotherhood of

Locomotive Engineers (BLE) as their collective bargaining representative under the Railway Labor Act to bargain with the railroad concerning rates of pay, rules, and working conditions (P. A. 3). On November 15, 1965, TRRA entered into a collective bargaining agreement with BLE which provided that only BLE may represent locomotive engineers in the handling of grievance matters (P. A. 6). The agreement does not in any way limit the individual engineer's right to represent himself in these matters. In compliance therewith, TRRA has refused to process the grievances of locomotive engineers which are presented and handled by representatives of the Brotherhood of Locomotive Firemen and Enginemen (BLF&E), a rival union which represents the craft of locomotive engineers on a very few railroads and which actively solicits membership in the craft of locomotive engineers on all railroads, but represents only the craft of firemen on TRRA.

On January 10, 1967, fifty-two locomotive engineers including respondent, John P. McElroy, filed a complaint in the United States District Court for the Eastern District of Illinois, alleging that TRRA violated Section 2 Second of the Railway Labor Act (45 U. S. C., § 152 Second) by not meeting with respondents' representative, BLF&E, to adjust grievances, Section 2 Third, by attempting to coerce them in the selection of their representatives, and Section 2 Fourth, by attempting to induce them to join BLE. Respondents asked the District Court to declare the agreement of Nov. 15, 1965, illegal and to permanently enjoin TRRA from applying it (P. A. 2-12). BLE intervened (P. A. 20-34).

On June 12, 1967, the District Court sustained TRRA's motion to dismiss for lack of jurisdiction (Appendix A). The Court of Appeals for the Seventh Circuit, however, finding first that an individual employee has a privilege under the Railway Labor Act to be represented in the

handling of grievances by a minority union of his choice, held that the District Court had jurisdiction to enforce that privilege (Appendix B). TRRA here seeks review of that decision.

REASONS FOR GRANTING WRIT.

The basic question involved here is whether or not a railroad must confer and adjust grievances with rival minority unions. As will be shown, the question is important to the successful application of the Railway Labor Act. Its proper resolution is necessary to peaceful labor relations in the railroad industry, particularly in view of the conflict between the decision of the Court below and those of other circuits.

1. The decision below is in conflict with decisions of the Court of Appeals for the Eighth Circuit which has ruled under both the Railway Labor Act and the National Labor Relations Act that an employer has no duty to meet with minority unions to adjust grievances. In **Butler v. Thompson,** 192 F. 2d 831 (8th Cir. 1951), the railroad had discharged a dining car waiter for using intoxicating liquor while on duty, and arguing that the collective bargaining agreement limited the choice of representative to "an employee," had not allowed the waiter to appear at his grievance hearing with an officer of a minority union. Relying on Section 2 Third of the Railway Labor Act, the employee filed suit for reinstatement and lost wages. The district court dismissed for want of jurisdiction, and on appeal, the Eighth Circuit affirmed, holding that provisions in the collective bargaining agreement concerning the choice of grievance representative are controlling and are not voided by the Railway Labor Act:

> "The statute recognizes a distinction between proceedings on the company level and those before the

> Adjustment Board when there is in effect a collective bargaining contract. In investigations, conferences or hearings by or before officers of the carrier an existing legal contract controls, whereas the procedure before the Board is controlled by the Statute." 192 F. 2d at 833.

Although the Court of Appeals in the present case attempted to distinguish **Butler** as a case involving "rival" unions, it is clear from the discussion above, that BLE and BLF&E do compete on the TRRA and on all railroads for members in the craft of locomotive engineers. These two cases have the same basic facts and there is an obvious conflict between the present case and **Butler**. This Court should resolve that conflict, for the issue involved is important to the administration of the Railway Labor Act. To permit a conflict in federal decisions resulting in varying practices on different railroads in different parts of the nation harms labor-management relations in the railroad industry, an industry otherwise noted for the uniformity of its labor practices.

Another decision of the Eighth Circuit which is in direct conflict with the opinion of the Court below is **Brooks v. Chicago, R. I. & P. R. Co.**, 177 F. 2d 385 (8th Cir., 1949). In **Brooks**, the Court ruled that it had no jurisdiction to consider the question relating to an agreement between the carrier and the bargaining agent which restricted the manner of representation of employees at company level grievance proceedings. The Court stated, l. c. 391: "The Railway Labor Act does not empower the courts to enforce against railroads any prescribed procedure for investigating and discharging its employees. . . ."

If the decision of the Court below is allowed to stand with the existing conflict of opinions between the Seventh and Eighth Circuits, on the same subject matter, Petitioner will be faced with a situation where its agreement

of November 15, 1965, would be valid as to its Missouri employees and invalid as to its Illinois employees.[2]

Moreover, the decision in the present case, to the extent that it represents a formulation of federal labor policy, also conflicts with several decisions of other courts of appeals. The Court of Appeals for the Eighth Circuit has held under the National Labor Relations Act that an employer has no duty to adjust grievances with unions other than the exclusive bargaining representative of the unit. **National Labor Relations Board v. Blades Mfg. Co.**, 344 F. 2d 998 (8th Cir. 1965). There, the employer refused to meet with a union which had been rejected by a majority of the employees in an election. The court said:

> "Since we have found that the company was under no duty to recognize and bargain with the union which did not validly represent a majority of its employees, the company was not in violation of § 8 (a) (5) in refusing to adjust their grievances with a union representative." 344 F. 2d at 1004.

The Court of Appeals for the Second Circuit has also held that under the National Labor Relations Act an employer has no duty to adjust grievances with minority unions. **National Labor Relations Board v. Posner**, 342 F. 2d 826 (2nd Cir. 1965). At one time the Second Circuit had ruled that the Act did not forbid minority unions from adjusting grievances where the collective bargaining agreement did not cover the matter. **Douds v. Local 1250**, 173 F. 2d 764 (2nd Cir. 1949).[3]

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[2] It is to be noted that the decision of the Court below is also in direct conflict with two of its own decisions. See, **Broady v. Illinois Cent. R. Co.**, 191 F. 2d 73 (7th Cir., 1951) (Cert. den. 342 U. S. 897); **Edwards v. St. Louis-San Francisco Railway Co.**, 361 F. 2d 946 (7th Cir., 1966).

[3] The National Labor Relations Board, however, has declined to follow **Douds**. See, **Federal Telephone & Radio Co.**, 107 N. L. R. B. 649 (1953); **Youngstown Cartage Co.**, 146 N. L. R. B. No. 34 (1964).

However, in **Posner**, the Second Circuit has repudiated and overruled, albeit *sub silentio*, the **Douds** case. The **Posner** case held that an employer who refuses to adjust grievances with a union organizer at a time when the union had not yet acquired majority support did not commit an unfair labor practice. The court said:

> "We have found no decisions which hold that an employer, pursuant to Section 8 (a) (1), must discuss grievances with a union organizer who represents only a minority of his employees." 342 F. 2d at 829.

The Court of Appeals below relied on **Douds** in reaching its decision. Apart from the fact that **Douds** is no longer precedent in the Second Circuit, Judge Learned Hand experienced much difficulty with the problem, clearly recognizing that his ruling might well "cause confusion in administration and introduce that strife between rival unions which was one of the chief purposes of the Act to prevent." 173 F. 2d 764 at 771.

The Court of Appeals for the Fifth Circuit has supported the Board's position on the exclusion of minority unions from grievance procedures. **Hughes Tool Co. v. National Labor Relations Board**, 147 F. 2d 69 (5th Cir. 1945), interpreting Section 9 (a) of the National Labor Relations Act as it read before the 1947 amendments, held that an employer who allowed a minority union to adjust grievances committed an unfair labor practice. The court disregarded as immaterial, evidence that the collective bargaining agent had exhibited hostility towards members of a minority union and had refused to process their grievances, ruling that the individual's right to present a grievance does not include the right to choose a minority union as representative.

The present case conflicts with the **Blades**, **Posner** and **Hughes** cases on a general issue of federal labor policy and with the **Butler** and **Brooks** cases on the specific issue

under the Railway Labor Act. It is clear, then, that the various courts of appeals require the leadership of this Court to formulate federal labor policy with respect to the role of the collective bargaining agent and minority unions in the grievance process.

2. The Court below sought to treat this matter as involving only the right of an individual employee to present, handle and confer with railroad management over his grievances. Thus, Circuit Judge Cummings said:

> "It is unnecessary to decide whether the Railway Labor Act would entitle plaintiffs to designate a minority union seeking to dislodge Engineers' Union. Our holding is simply that these plaintiffs, already members of the Firemen's Union, can designate that union to represent them on the Terminal property and before the National Railroad Adjustment Board with reference to time claims and disciplinary investigations occurring while plaintiffs performed the services of locomotive engineers" (Appendix B, p. 34).[4]

This approach blinks at reality. The BLF&E is a rival minority union and competes with the BLE for members in the craft of locomotive engineers at TRRA and on all railroads. Moreover, since the Award of Arbitration Board No. 282, 41 Labor Arbitration Reports 673, has sharply reduced the number of firemen employed on American railroads, it must be recognized that as an organization BLF&E is anxious to expand its membership in the craft of locomotive engineers. Therefore, by requiring the TRRA to meet with the BLF&E to adjust engineers' grievances, the Court of Appeals for the Sev-

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[4] The question of representation before the Adjustment Board is not involved in this case; the agreement provisions involved relate only to the handling of grievances on the railroad itself.

enth Circuit has given it an effective weapon to seek to dislodge BLE.[5]

Petitioners submit such a result is highly undesirable and erroneous. The Railway Labor Executives Association and the American Federation of Labor in their *amici curiae* brief on reargument in **Elgin, Joliet & Eastern Ry. Co. v. Burley**, quoted by Mr. Justice Frankfurter (dissenting opinion), 327 U. S. 661, described the problem when the duly designated representative does not handle grievances arising under its contract:

> "In summary, therefore, we submit that the regulatory scheme of the Railway Labor Act requires for its effective operation a recognized authority in the collective bargaining representative to proceed in its own right to adjust disputes regarding the interpretation or application of agreements. A denial of that right will produce no real benefits to individual employees, will impair the effectiveness of representatives as stabilizing influences in this field, will deprive the carriers of any agency to which they may go to secure a final settlement of many vexatious labor controversies and will bring about a general deterioration of relations between employees and management which will necessarily impair the paramount interest of the public in uninterrupted transportation." 327 U. S. at 671.

To require that a railroad handle grievance matters with a minority union in active competition with the majority union will magnify many times the problems described above.

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[5] How the BLF&E made use of the Court of Appeals' decision to further its own organizational efforts is shown in the "news" story which appeared in the March 8, 1968 issue of BLF&E's official weekly newspaper, "Enginemen's Press." See Appendix D.

The Court of Appeals in its decision gave Section 2 Second of the Railway Labor Act (45 U. S. C., § 152 Second) a literal reading to support its decision and erroneously stated that such an interpretation found support in the Act's 1934 legislative history. The Court of Appeals said:

> "In the House hearings, both Commissioner Eastman and George Harrison, the spokesman for the standard railroad labor unions, expressed the view that railroad employees have the right to be represented by minority unions in grievance matters" (Appendix B, p. 28).

citing Hearings of House Committee on Interstate and Foreign Commerce (73rd Cong., 2d Sess.) on H. R. 7650 at pp. 44, 89.

However, reference to that testimony reveals no mention by either of those gentlemen of minority union representation in grievance matters. Indeed, both stressed that the language in the Act, relied on by the Court below, was intended to protect the rights of the **individual** to prosecute and handle **his own** grievances if he so desired.

The case of **D'Amico v. Pennsylvania Railroad Co.**, 191 F. Supp. 160 (D. C. N. Y. 1961) makes clear that "representatives" in Section 2 of the Railway Labor Act does not apply to grievance proceedings at property level discussions. In **D'Amico** the Court stated, l. c. 162, 163:

"Essentially the issue presented is whether, in the preliminary investigation and hearing procedure applicable to a minor dispute, the Act vests the plaintiff with the right to counsel. Plaintiff urges that it does, and to support his position he relies upon certain provisions of section 2 of the Act, which, in substance, provide that the 'representatives' of the respective parties to a dispute

shall be designated without interference by either party and that 'no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.' However, these and other provisions of section 2 are directed toward assuring the independence and integrity of employee representatives in the collective bargaining process and that they will serve all the employees they purport to represent with fairness and impartiality and free from carrier coercion or influence.

"A fair reading of section 2, considered in the light of its overall purposes, compels the conclusion that 'representative', as used therein and defined in section 1, Sixth, does not grant to an individual employee involved in a minor dispute with his employer the right of counsel at the hearing of charges at the company level, which is but one of the initial steps in the procedure set up under the Act for the adjustment of disputes."

The Court below relied upon two cases which it said had ruled that an individual has the "privilege" of choosing his own representative for the prosecution of his grievance claim. The first was **Estes v. Union Terminal Co.**, 89 F. 2d 768, 770 (5th Cir. 1937), in which the statement relied upon was dictum. The second case was **General Committee v. Southern Pacific Co.**, 132 F. 2d 194 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U. S. 338, which is of highly doubtful precedent value if it can be considered any precedent at all.

3. The Railway Labor Act imposes upon carriers by rail a duty to treat exclusively with the majority union representing the craft for purposes of collective bargaining. **Virginian Railway Co. v. System Federation No. 40**, 300 U. S. 515 (1937). The National Mediation Board had certified the System Federation as the designated repre-

sentative for shopcraft employees but the Virginian continued to bargain with a company union. Speaking for the Court, Mr. Justice Stone said:

> "The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." 300 U. S. at 548.

Justice Stone did not limit this admonition to the making of collective agreements. Indeed, in **Virginian Railway**, this Court affirmed a district court injunction which not only required the carrier to bargain with the duly designated agent over rates of pay, rules, and working conditions, but also ordered the railroad to "exert every reasonable effort . . . to settle all disputes, whether arising out of the application of such agreements or otherwise . . ." 300 U. S. at 540. Thus, this Court in **Virginian Railway** recognized that under the Railway Labor Act a carrier's affirmative duty to treat with the certified bargaining agent and its negative duty not to treat with minority unions covered grievance handling and apparently settled the role of the duly authorized representative of the craft with respect to both collective bargaining and grievance adjustment.

In 1945 this Court, in **Elgin, Joliet and Eastern Railway Company v. Burley**, 325 U. S. 711 (1945), considered the rights of an **individual** employee in the settlement of his grievance. We emphasize that this decision must be considered in its proper context. This Court in **Burley** dealt only with the rights of individual employees to reject the

settlement of accrued time claims and did not deal with the rights of minority unions to represent such employees in the processing of their grievances.

This Court, in effect, provided that an individual employee could not be excluded from the settlement of his grievance; that authorizing a union to progress a claim to the National Railroad Adjustment Board does not as a matter of law authorize that union to settle such claim.

The effects of the first **Burley** decision are a matter of history. Rehearing was granted and the original decision "adhered to" 327 U. S. 661 (1946). However, in the words of Mr. Justice Frankfurter, the Court extracted from its first **Burley** opinion "almost all of its vitality" (327 U. S. at 668, dissenting opinion). In its second opinion, this Court simply held that an individual employee who knows that the collective agent is negotiating his grievance with the carrier must affirmatively reject the union's apparent authority or be bound by any settlement.

Some of the Court's statements in **Burley** led to confusion as to the role of the bargaining agent in the grievance process and the continuity, or lack thereof, between collective bargaining and grievance adjustment. When the two **Burley** decisions are read in their proper context, there is no conflict between those decisions and the **Virginian** decision. Only when the **Burley** opinions are broadly construed, as the Court of Appeals did here, does the confusion arise. It was error for the Court to apply the principle announced in **Burley** to rival minority unions. Like the Court of Appeals below, then Attorney General, Tom C. Clark, in his opinion concerning the role of minority unions in the grievance process, 40 Op. A. G. 484 (1946), read too much into the **Burley** decision. The individual's rights under the Railway Labor Act cannot be held to extend to the point where he can inject a rival minority union into the grievance process.

Notwithstanding the broad reading of **Burley** by others, this Court has consistently recognized that because of the nature of industrial self-government, grievance adjustment is a critical, integral phase in the continuing process of collective bargaining, which apparently comes within the collective bargaining agent's exclusive power. Thus, in **United Steelworkers v. Warrior & G. Nav. Co.**, 363 U. S. 574 (1960), this Court said:

> "A collective bargaining agreement is an effort to erect a system of industrial self-government. . . . The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, 'a compilation of diverse provisions: Some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.' . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. **But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government.** Arbitration is the means of solving the unforeseeable

by holding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. **The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.**

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. **The grievance procedure is, in other words, a part of the continuous collective bargaining process.** It, rather than a strike, is the terminal point of a disagreement." 363 U. S. at 580-581 (Emphasis supplied).

There can be no real concrete distinction between the processes of collective bargaining and grievance adjustment; since to realize the benefits accruing to the craft through the efforts of the collective bargaining agent, it is necessary to enforce and apply the agreement on a day-to-day basis. The collective agreement has meaning only in the sense that it is applied because adjudications of past grievances, which **Burley** failed to understand, essentially constitute rule making for the future. Collective bargaining for the terms of an agreement, therefore, necessarily implies collective action when enforcing the proper application of that agreement, otherwise the result would be to ignore the future effect of such determinations upon the whole of the craft. Consequently, if under the Railway Labor Act a carrier has a duty to treat exclusively with the duly authorized representative of the craft over rates of pay, rules and working conditions, it has a corresponding duty to treat exclusively with the same representative over the ad-

justment of grievances. See Cox, **Some Aspects of the Labor Management Relations Act,** 1947, 61 Harv. L. Rev. 274, 302 (1948); Cox, **Reflections Upon Labor Arbitration,** 72 Harv. L. Rev. 1482 (1952); Wyle, **Labor Arbitration and the Concept of Exclusive Representation,** 7 B. C. Ind. & Com. L. Rev. 783 (1966).

By insisting that a minority union has the right to participate in grievance proceedings prior to National Railway Adjustment Board consideration, the Court below would interfere with the grievance machinery established through proper negotiations between the company and the duly authorized bargaining agent. The Railway Labor Act gives a minortiy union no such right.

Edwards v. St. Louis-San Francisco Railroad Co., 361 F. 2d 946 (7th Cir. 1966), further emphasizes the conflict between the decision of the Court below and the clear meaning of the Railway Labor Act which provides no right in the employee to a minority union's representation at company level grievance proceedings. In **Edwards,** the Court stated, l. c. 953, 954, 955:

> **"The provisions of the Railway Labor Act govern neither the procedure by which a carrier may discharge its employees nor the conduct of an investigation hearing on railroad property.**
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> * * * * * * *
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> "The federal courts are not the guarantors of any rights of either labor or management at the initial hearing either by force of the Constitution or the Railway Labor Act, for, as we have said, **at that stage the dispute is between private parties and the applicable procedure for settling the dispute is governed by the contract between them.**
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> "Moreover, appellant's attempt to equate the review functions of the Adjustment Board with pro-

hibited governmental action ultimately resolves itself into a direct attack upon the constitutionality of those provisions of the Railway Labor Act creating the Adjustment Board with authority to finally settle disputes which evolve otherwise unadjusted out of the grievance procedure agreed upon between the parties. If appellant were to prevail on this contention, the Adjustment Board, at best, would have limited jurisdiction to settle only those disputes which had come up through constitutionally acceptable procedures below, and, therefore, **the Railway Labor Act would do indirectly what it does not pretend to do directly, that is, regulate the grievance procedures at the company level, procedures heretofore left to the carrier and the employees to devise for themselves''** (Emphasis supplied).

In **Conley v. Gibson,** 355 U. S. 41 (1957), this Court held that under the Railway Labor Act the exclusive bargaining representative has a duty not to discriminate against individual members of the craft in the adjustment of grievances. This was but a logical extension of **Steele v. Louisville and Nashville R. R. Co.,** 323 U. S. 192 (1944), where this Court first embraced the doctrine of fair representation in the making of collective contracts. The rationale for such a doctrine has been that the right of a union to be the exclusive representative of a craft implies a duty to act on behalf of all members of the craft without discrimination. Since the duty of fair representation derives from the exclusiveness of the right to represent, to the extent that duties and rights correspond, a duty to adjust grievances on behalf of all without discrimination would mean a right to exclusively represent the craft in grievance procedures.

In **Conley,** the railroad had discharged certain Negro employees in violation of the seniority and protection provisions of the collective bargaining agreement ap-

plicable to their craft—and had replaced them with white employees. Because their duly authorized representative had refused to present their grievances, these discharged employees brought suit against the union, alleging hostile discrimination. The union defended on the ground of failure to state a claim, arguing that a representative's duty of fair representation covers only the making of collective bargaining agreements and not grievance adjustment. This Court, however, contrary to dicta in **Burley**, found that collective bargaining is a continuing process which encompasses grievance procedures.

Moreover, this Court emphasized the bargaining representative's role in this process, stating specifically that a minority union cannot adjust grievances on behalf of individual members of the craft:

> "The respondents point to the fact that under the Railway Labor Act aggrieved employees can file their grievances with the Adjustment Board or sue the employer for breach of contract. Granting this, it still furnishes no sanction for the union's alleged discrimination in refusing to represent petitioners. The Railway Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their representative in negotiating with the employer or in presenting their grievances to him. **Nor may a minority choose another agent to bargain in their behalf . . .**" 355 U. S. at 47. (Emphasis added.)

Conley seems to say, therefore, that there is a duty to act on behalf of all members of the craft without discrimination because the majority union has a right to exclusively represent the craft. If their individual em-

ployees could choose a minority union for grievance handling, there would be no need to impose a duty of fair representation upon the majority representative.

While petitioners believe sound reason and precedent point the clear path to be followed in this area, the confusion which arises due to the conflict between **Virginian Railway** and an expansive interpretation of **Burley** should be settled. This is an appropriate case, therefore, for this Court to authoritatively define the role of the exclusive bargaining agent in the grievance process and determine if the railroads have a duty to adjust grievances with minority unions. Indeed, a rule such as indicated in the dicta of **Conley** would effectively avoid the destructive influence of inter-union rivalry. As Professor Cox has observed, permitting minority unions to participate in grievance procedures creates competition among unions which results in an irrational insistence upon the adjustment of trivial and ill-founded grievances:

> "Vesting the union with control of all grievances increases the likelihood of uniformity and therefore reduces 'a potential source of competitions and discriminations that could be destructive of the entire structure of labor relations in the plant.' To deny the majority representative power to control the presentation of grievances offers dissident groups, who may belong to rival unions, the opportunity 'to press aggressively all manner of grievances, regardless of their merit, in an effort to squeeze the last drop of competitive advantage out of each grievance and to use the settlement even of the most trivial grievances as a vehicle to build up their own prestige. Imaginary grievances could be conjured up and others which, under ordinary circumstances would be dropped at the first step could be magnified out of all proportion to their importance. The settlement of grievances could become the source of friction and compe-

tition and a means for creating and perpetuating employee dissatisfaction instead of a method of eliminating it." Cox, **Rights Under a Labor Agreement**, 69 Harv. L. Rev. 601, 626 (1956).

Thus, as a practical matter, by excluding minority unions from the grievance process, this Court would do much to obtain labor peace in the railroad industry.

CONCLUSION.

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX A.

Opinion of the District Court.

(Filed January 13, 1967.)

Juergens, Chief Judge

Plaintiffs filed their suit, alleging jurisdiction under Title 28, Sections 1331 and 1337, and the Railway Labor Act, Title 45, Section 151, et seq.

Generally stated, the complaint alleges that defendant is a corporation organized under the laws of the State of Missouri and is engaged in conducting railroad operations and is engaged in interstate commerce; that plaintiffs are employees of defendant; that they began their employment as locomotive firemen and have subsequently qualified as locomotive engineers; that locomotive engineers employed by defendant are represented, for the purposes of the Railway Labor Act, by a railway labor organization known as the Brotherhood of Locomotive Engineers (BLE), which union has from time to time negotiated collective agreements with the defendant for the purpose of establishing rates of pay, rules, etc., governing employment of locomotive engineers on the defendant railroad; that due to seasonal, economic and other considerations, the amount of traffic handled and the switching services performed by the defendant varies from time to time and the number of locomotive engineers and locomotive firemen needed by defendant to perform its services varies; that to meet the varying needs for engineers and firemen, there have been established an engineers' schedule agreement and a firemen's schedule agreement, which contain uniform and reciprocal rules and conditions that enable the employees comprising the firemen's craft and the employees comprising the engineers' craft to shuttle back and forth between the two crafts; that when the plaintiffs are working as

firemen, their employment is governed by the rules contained in the firemen's schedule agreement, and when employed as engineers, the rate of pay, rules and conditions are governed by the engineers' schedule agreement; that in the course of plaintiffs' employment as engineers, grievances and time claims frequently develop and become the subject of disputes; that the grievances and claims are normally presented to defendant's operating officials and are processed in negotiations with defendant's representatives or sometimes presented to the National Railroad Adjustment Board; that prior to November 15, 1965, grievances and claims arising while plaintiffs worked as engineers were subject to the terms and conditions of the engineers' schedule agreement and were customarily presented to the defendant and processed by a representative of the railway labor union of which plaintiffs were members, whether the union be the BLE or other railway labor unions; that on November 15, 1965, the defendant and the BLE entered into an agreement which compelled plaintiffs and other employees of defendant in positions similar to plaintiffs to select only the BLE to be plaintiffs' representative for the purpose of processing and seeking settlement of grievances developing while plaintiffs are employed as locomotive engineers; that subsequent to entering into the agreement, plaintiffs have had claims develop while working as locomotive engineers and have requested the representative of a railway labor organization other than the BLE to process and seek a satisfactory settlement of the claims with the defendant; that the claims were denied; thereafter, the representative of a railway labor union of which claimants are members appealed the claims to defendant's General Superintendent who declined to consider the claims for the reason that the agreement concluded by the defendant and BLE permits an individual engineer to be represented in the handling of claims or grievances only by that union; that the claims were subsequently appealed to defendant's

Manager of Labor Relations and were again denied for the same reason. Plaintiffs seek to have this Court adjudge that the agreement of November 15, 1965 violates the duty imposed upon the carriers by the Railway Labor Act and that by entering into the agreement defendant violated plaintiffs' rights under the Railway Labor Act.

The BLE has filed its motion to intervene as a defendant. The Court has considered the motion and finds that it is well taken. An order will be entered joining the Brotherhood of Locomotive Engineers as a party defendant.

The original defendant and the intervening defendant have both filed motion to dismiss, alleging, among other things, that this Court lacks jurisdiction to entertain the cause of action here presented in that the Railway Labor Act makes provisions for the dispositions of matters presented and provides administrative remedy which gives exclusive jurisdiction for the hearing and settlement of disputes of the type here involved.

The United States District Court for the Western District of Kentucky had for consideration in Switchmen's Union v. Louisville and Nashville R. Co., 130 F. Supp. 220, a matter quite similar to the one presented here. Chief Judge Shelbourne in a very thorough manner examined the matters presented and found that the Court had no jurisdiction to entertain the cause, finding that administrative remedies provided exclusive jurisdiction. The reasoning and conclusion reached in Switchmen's Union (supra) are equally applicable to the factual situation presented here.

The complaint and cause of action will be dismissed for want of jurisdiction.

William G. Juergens,
Chief Judge.

Dated: June 12, 1967.

APPENDIX B.

Opinion of the United States Court of Appeals For the Seventh Circuit.

(February 28, 1968.)

Before Hastings, Chief Judge, and Schnackenberg and Cummings, Circuit Judges.

Cummings, Circuit Judge. Plaintiffs are 52 employees of the Terminal Railroad Association of St. Louis ("Terminal") and are members of the Brotherhood of Locomotive Firemen and Enginemen ("Firemen"). Terminal is a switching terminal serving 14 trunk-line railroads in the St. Louis area. It is a common carrier by railroad and subject to the Railway Labor Act (45 U. S. C., § 151 *et seq.*). The complaint alleges that Terminal violated the Railway Labor Act by entering into a November 15, 1965, agreement with the Brotherhood of Locomotive Engineers ("Engineers"), providing that employees working as locomotive engineers must be represented exclusively by the Engineers' union as to grievances processed on the Terminal Railroad, even though the particular employees are members only of the Firemen's union and wish to be represented by that union. Relying on certain provisions of the Railway Labor Act, plaintiffs in effect are seeking a judgment that would require Terminal to confer and negotiate with the Firemen, the representative designated by plaintiffs, in settling grievance and disciplinary matters.

Plaintiffs began their employment with Terminal as locomotive firemen, and their rates of pay, rules of employment and working conditions were established pursuant to collective bargaining agreements between the Firemen and Terminal. They were later promoted to

locomotive engineers and have seniority status in both crafts. They shuttle back and forth between the two crafts, depending upon the needs of Terminal. When their seniority standings on the engineers' seniority roster are insufficient to permit their continuing work in that craft, they work in the craft of locomotive firemen. When they work as firemen, the collective bargaining contract between the Firemen and Terminal establishes the applicable rates of pay and working conditions; when they work as engineers, the bargaining contract between the Engineers and Terminal governs such matters.

While 17 of the plaintiffs were working as locomotive engineers, they filed time claims with Terminal. These claims were denied at the initial level on Terminal's property. Thereafter, the Firemen's union appealed the claims to Terminal's General Superintendent and then to its Manager of Labor Relations. These officials denied the appeals on the ground that the November 15, 1965, agreement between Terminal and the Engineers permits only the Engineers' union to represent locomotive engineers in the handling of time claims and grievances.

One of said 17 plaintiffs and another plaintiff were involved in accident investigations conducted by Terminal, and still another plaintiff was called as a witness in one of the investigations, but Terminal refused to permit them to be represented by the Firemen because of the November 15, 1965, agreement between Terminal and the Engineers.

These 19 plaintiffs were joined in the litigation by 33 other employees of Terminal who are also members of the Firemen and sometimes work as locomotive engineers. All 52 asked the District Court to void Articles 34 and 35 of the November 15, 1965, Terminal-Engineers' contract as violative of the Railway Labor Act.

Prior to the November 15, 1965, agreement between Terminal and the Engineers, the railroad had for many years permitted locomotive engineers who were members of the Firemen to be represented by that union for the purpose of settling their grievance or disciplinary problems on the property. Subsequently, Terminal has refused to permit the Firemen's union to handle such matters. The reason for this refusal is that Article 34 of the November 15, 1965, agreement between the Engineers and Terminal limits the representation of individual locomotive engineers in the handling of time claims or grievances to the Engineers' union, and Article 35 similarly permits only the Engineers' union to represent individual engineers during the investigation of cases involving their suspension or dismissal.

The District Court permitted the Engineers to intervene and subsequently dismissed the action, holding that the National Railroad Adjustment Board has exclusive jurisdiction over this type of controversy. Concluding that judicial relief is warranted under the Railway Labor Act, we reverse.

This case presents for decision the question left open in *General Committee v. Southern Pacific Co.*, 320 U. S. 338, 344, namely, whether an employee's assertion of "the privilege of choosing his own representative for the prosecution of his [grievance] claims" under the Railway Labor Act is justiciable. Two courts of appeals and then Attorney General Tom C. Clark have ruled that he has such a privilege,[1] and we agree with their conclusions. Because there is such a privilege, federal court jurisdiction follows:

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[1] *Estes v. Union Terminal Co.*, 89 F. 2d 768, 770 (5th Cir. 1937); *General Committee v. Southern Pacific Co.*, 132 F. 2d 194 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U. S. 338; 40 Op. A. G. 494 (1946).

Ever since *Texas and New Orleans R. Co. v. Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548,[2] the federal courts have consistently held that Congress intended them to enforce the commands of the Railway Labor Act.[3] Therefore, if the Railway Labor Act accords these plaintiffs the right to designate the Firemen's union as their representative for settling grievances, the District Court did have jurisdiction to award appropriate relief unless jurisdiction over this dispute has been granted exclusively to the National Railroad Adjustment Board.

The Railway Labor Act has divided disputes between carriers and their employees into two classes. The major disputes concern the making and maintaining of collective bargaining agreements, whereas the minor disputes concern grievances and contract interpretation or application questions.[4] Of course, as to major disputes, it is unquestioned that the Engineers' union is exclusively entitled to represent the plaintiffs, when working as locomotive engineers, by virtue of Section 2 Ninth of the Railway Labor Act. See *Virginian Railway v. System Federation No. 40,* 300 U. S. 515.

Section 2 Second of the Railway Labor Act provides that all disputes shall be considered "in conference between *representatives designated* and authorized so to confer, respectively, by the carrier or carriers and *by*

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[2] This holding was justified by H. R. Rep. No. 328, 69th Cong., 1st Sess., pp. 1-2, where the House Committee on Interstate and Foreign Commerce expressed the desirability of judicial aid to settle questions under the Railway Labor Act.

[3] *Virginian Railway v. System Federation No. 40,* 300 U. S. 515; *Steele v. Louisville & Nashville R. Co.,* 323 U. S. 192; *Brotherhood of Railroad Trainmen v. Howard,* 343 U. S. 768; *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.,* 353 U. S. 30; *Felter v. Southern Pacific Co.,* 359 U. S. 326.

[4] *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.,* 353 U. S. 30, 33.

the employees thereof interested in the dispute" (45 U. S. C., § 152 Second; italics supplied). On its face, this provision guarantees an individual employee the right to prosecute his grievances through any representative he may designate. This reading of Section 2 Second is buttressed by the legislative history of the Railway Labor Act of 1934. In the House hearings, both Commissioner Eastman and George Harrison, the spokesman for the standard railroad labor unions, expressed the view that railroad employees have the right to be represented by minority unions in grievance matters.[5] This construction is consonant with other provisions of the Railway Labor Act. Thus Section 2 Third permits employees and carriers to designate representatives without interference from either side, and the representatives of the employees need not even be employees of the carrier. Section 2 Fourth permits individual employees or their local representatives to confer with management during working hours without loss of time.[6] As to minor disputes, Section 2 Sixth provides that the designated representatives of the employees and carriers have the duty to specify the time and place for a conference within ten days after receipt of notice. In Section 3 First (j), Congress concededly granted employees the right to choose any representatives to act on their behalf in handling minor disputes before the National Railroad Adjustment Board. This is also indicative of a similar Congressional intent as to the preliminary negotiations with the carrier.

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[5] Hearings of House Committee on Interstate and Foreign Commerce (73rd Cong., 2d Sess.) on H. R. 7650, pp. 44, 89.

[6] In *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, 331, the Court recognized that the commands of Sections 2 Third and 2 Fourth are judicially enforcible. As to Section 2 Second, a similar indication appears in *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, 200.

The provisions in Section 3 First (i) that minor disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" is pertinent too. Admittedly, it was the customary practice on the Terminal for a fireman working as a locomotive engineer to select the Firemen's union as his representative for grievance purposes. The Congressional approval of the "usual manner" of handling grievances shows that the Railway Labor Act was not intended to thwart the established practice in this respect.

Besides the foregoing statutory provisions, the landmark case of *Elgin, Joliet and Eastern Railway Co. v. Burley*, 325 U. S. 711, sheds light on this problem. There it was determined that individual employees have the right to present their grievances to the National Railroad Adjustment Board. The Court held that "the individual employee's rights cannot be nullified merely by agreement between the carrier and the union. They are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf." 325 U. S. at p. 740, note 39.[7] Under that interpretation of the Railway Labor Act, it is clear that the Terminal and Engineers cannot nullify these plaintiffs' rights to select the Firemen's union as their representative for grievance purposes. The *Burley* case teaches that individual rights of employees, such as those advanced here, cannot be nullified unless Congress clearly intended such consequences (325 U. S. at pp. 733-734). No such intent is expressed by the language of the Railway Labor Act. In fact, as seen, the statutory language supports plaintiffs.

In *Burley*, it was noted that the individual employee's ideas of appropriate settlement might differ from the

[7] The importance of individual choice was also stressed in *Felter v. Southern Pacific Co.*, 359 U. S. 326, 333-334, when dealing with Section 2 Eleventh (b) of the Act.

union's, so that an individual employee should be permitted to reject a union settlement of a minor dispute unless he had authorized the union to represent him (325 U. S. at p. 736). Similarly, if, as here, individual employees do not care to be represented by the majority union in the processing of minor disputes, they should be able to choose their own union for that purpose. Judge Learned Hand so recognized under the Labor Management Relations Act in *Douds v. Local 1250,* 173 F. 2d 764, 772 (2d Cir. 1949):

> "There only remains the question whether an individual employee or a minority—a 'group'—must negotiate the adjustment of their 'grievance' without the help of a union which it has been their custom to use as their representative. We have little to add to what we said before. Behind the whole Act, indeed, its main presupposition, is the assumption that in industrial negotiations an individual, or a minority, does not bargain on equal terms with an employer. It is not reasonable to suppose that Congress, after giving a minority this privilege, should wish to deprive it of that means of exercising it, which for this reason is the putative condition of its effective use."[8]

Likewise, in *General Committee v. Southern Pacific Co.,* 132 F. 2d 194, 198 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U. S. 338, the court pointed out the injustice of having one union represent inter-craft employees, some being members of another union, with rival seniority claims. The court observed that "confidence and trust necessary between a suitor and his representative" would be absent if the employees were required

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[8] In *Douds,* Judge Hand approved of and followed Attorney General Tom C. Clark's opinion that the Railway Labor Act invalidates a collective bargaining agreement that prevents an individual from negotiating with the carriers through his own union representative in settling grievances. See 173 F. 2d at p. 773

to be represented by unions of which they were not members.

Terminal and the Engineers urge that the National Railroad Adjustment Board has exclusive jurisdiction to determine the validity of the clauses in the Terminal-Engineers contract making the Engineers' union the exclusive representative of locomotive engineers in settling grievances and disciplinary matters. However, the Supreme Court has decided that contract validity questions are for the courts and not for the Adjustment Board. *Brotherhood of Railroad Trainmen v. Howard,* 343 U. S. 768, 774; *Felter v. Southern Pacific Co.,* 359 U. S. 326, 327, note 3. As in *Steele v. Louisville & Nashville R. Co.,* 323 U. S. 192, 205, the Adjustment Board will not give the relief sought here,[9] so that judicial intervention is necessary.

In an effort to show that the courts have no jurisdiction of this controversy, the Terminal and Engineers lean heavily on *General Committee v. Southern Pacific Co.,* 320 U. S. 338. There the Engineers' union sued for a declaratory judgment that the collective bargaining agreement between the Firemen's union and the Southern Pacific Railway was invalid because it permitted engineers belonging to the Firemen's union to have that union represent them in the handling of their grievances. Following two opinions handed down the same day,[10] the Court concluded that Congress left such "jurisdictional

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[9] See *General Committee v. Southern Pacific Co.,* 132 F. 2d 194, 201 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U. S. 338; *United Railroad Workers of America v. Atchison, Topeka & Santa Fe R. Co.,* 89 F. Supp. 666, 668 (N. D. Ill. 1950); *Switchmen's Union v. Louisville & Nashville R. Co.,* 130 F. Supp. 220, 223-224 (W. D. Ky. 1955).

[10] *Switchmen's Union v. National Mediation Board,* 320 U. S. 297; *General Committee v. Missouri-Kansas-Texas R. Co.,* 320 U. S. 323.

controversies between unions to agencies or tribunals other than the courts" (at p. 344). The dispute there was a pure jurisdictional dispute because the agreement in question did not detract from possible employee rights, but adversely affected only the Engineers' union. Here the individual plaintiffs who work as engineers are adversely affected by the Terminal-Engineers' contract. The question of their right to judicial relief was not involved in the *Southern Pacific* case and was expressly left open (*ibid.*). The Supreme Court's decision in the related *M-K-T* case recognizes that federal courts do have jurisdiction to enforce the commands of the Railway Labor Act (320 U. S. at pp. 329-331), and there is such a command here.

At the oral argument, the Engineers' union admitted it could sue Terminal for breach of contract if Terminal allowed the Firemen's union to represent plaintiffs in these minor disputes. In such a suit, Terminal could raise the invalidity of Articles 34 and 35 as a defense, rendering the issue justiciable. To our mind, Congress certainly did not intend the unfair result of making this question of justiciability depend solely on the carrier's unilateral decision as to whether or not to abide by its contract.

Terminal and Engineers rely on *Broady v. Illinois Central R. Co.*, 191 F. 2d 73 (7th Cir. 1951), certiorari denied, 342 U. S. 897; *Edwards v. St. Louis-San Francisco R. Co.*, 361 F. 2d 946 (7th Cir. 1966); *Brooks v. Chicago, Rock Island & Pacific R. Co.*, 177 F. 2d 385 (8th Cir. 1949), and *Butler v. Thompson*, 192 F. 2d 831 (8th Cir. 1951). Those cases did not involve the unique situation presented here where employees shuttle back and forth between their crafts. Here, by virtue of Section 2 Eleventh (c) of the Railway Labor Act, the plaintiffs have the right to maintain their membership in the Firemen's union even while working as engineers. See *Pennsylvania R. Co. v. Rychlik*,

352 U. S. 480; *Birkholz v. Dirks,* .... F. 2d .... (7th Cir. 1968).

In *Broady,* the employee sought to be represented not by a union with a collective bargaining contract with the railroad, but by a "rival union."[11] *Broady* is not determinative, for this Court did not construe Section 2 of the Railway Labor Act nor discuss the *Burley* case, and Section 2 Eleventh (c) of the Act was not brought to the Court's attention. Since the *Howard* and *Felter* cases had not yet been decided (*supra,* p. 7), one basis for the *Broady* decision was apparently the then prevalent notion that the federal courts had no jurisdiction to pass upon this kind of controversy; the same is true with respect to *United Railroad Workers v. Atchison, Topeka & Santa Fe R. Co.,* 89 F. Supp. 666 (N. D. Ill. 1950). It and *Butler* and *Roberts v. Thompson,* 107 F. Supp. 775 (E. D. Ark. 1952), are likewise distinguishable because they are "rival union" cases. The Terminal and Engineers rely too on *Switchmen's Union v. Louisville & Nashville R. Co.,* 130 F. Supp. 220 (W. D. Ky. 1955), but that opinion was based on the *Broady* and *United Railroad Workers* cases, neither of which is dispositive of the problem at hand.

Edwards did not involve the question whether employees are entitled to be represented by unions of their own choice in grievance matters. The principal question involved was an interpretation of Article 40 of the collective bargaining agreement between the Order of Railway Conductors & Brakemen and the Frisco, a question committed exclusively to the National Railroad Adjustment Board under *Order of Railway Conductors v. Pitney,* 326 U. S. 561, and *Slocum v. Delaware Lackawanna & Western R. Co.,* 339 U. S. 239.

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[11] The term "rival union" as used herein excludes those unions defined in Section 2 Eleventh (c) of the Railway Labor Act and qualified by the National Mediation Board.

Edwards and *Brooks* and other cases on which the Terminal and Engineers rely[12] involve efforts of an employee to set aside an unfavorable grievance decision by challenging the procedures through which it was reached. Such efforts are frowned upon by the courts, for grievance procedures are supposed to be a substitute for litigation. The instant plaintiffs are not trying to overturn unfavorable grievance decisions, so that appellees' cases challenging grievance decisions are not controlling.

It is unnecessary to decide whether the Railway Labor Act would entitle plaintiffs to designate a minority union seeking to dislodge Engineers' union. Our holding is simply that these plaintiffs, already members of the Firemen's Union, can designate that union to represent them on the Terminal property and before the National Railroad Adjustment Board with reference to time claims and disciplinary investigations occurring while plaintiffs performed the services of locomotive engineers. To that extent, Articles 34 and 35 of the Terminal-Engineers contract of November 15, 1965, are invalid, but our judgment does not bar the Engineers' union from discussions on the Terminal property or before the National Railroad Adjustment Board when its interests are involved.

Finally, it should be noted that our holding does not encourage the formation of a new minority union. *Cf. Pennslyvania R. Co. v. Rychlik,* 352 U. S. 480. The Firemen's union was long established as the authorized bar-

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[12] *D'Elia v. New York, New Haven & Hartford R. Co.,* 230 F. Supp. 912 (D. Conn. 1964), affirmed, 338 F. 2d 701 (2d Cir. 1964), certiorari denied, 380 U. S. 978; *D'Amico v. Pennsylvania R. Co.,* 191 F. Supp. 160 (S. D. N. Y. 1961); and *Brooks* concerned the alleged right to counsel during grievance proceedings on the railroad property and not the question whether employees have the statutory right to be represented in minor disputes by their union.

gaining representative of these plaintiffs and, as noted, is within the protection of Section 2 Eleventh (c) of the Railway Labor Act. These two unions have lived together and with railroad employers for a long time. To allow the Firemen's union to continue to represent its members in grievance matters would hardly change the balance of power and certainly would not inject a new union into the situation. *Cf. Pennsylvania R. Co. v. Rychlik,* 352 U. S. 480. Section 2 Eleventh (c) of the Act provides that an employee need belong only to one union. Logically, that union should have the right to represent him in grievance proceedings. If appellees were to prevail, Section 2 Eleventh (c) would be rendered a nullity as to these plaintiffs. The "membership" conferred by that Section would, for them, be a naked legal right unaccompanied by any of the ordinary material benefits of belonging to a union. Although our decision means that members of the Firemen's union may have their union represent them in grievances arising while they work as engineers, it also means that members of the Engineer's union have the right to be represented by that union in grievances while they work as firemen. Thus, our decision puts the two unions on a parity with each other and should not cause defections in either direction. In contrast, the effect of the November 15, 1965, agreement between Terminal and the Engineers would discourage membership in the Firemen's union by making it impossible for plaintiffs to be represented by that union in minor disputes.

The judgment is reversed and the cause is remanded with directions to enter judgment for plaintiffs in conformity with this opinion.

APPENDIX C.

Statutes Involved.

Title 45 U. S. C.

§ 152.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if, possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employ-

ees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: ***And provided further***, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

APPENDIX D.

(From the March 8, 1968 Issue of Enginemen's Press.)

BLE AND CARRIER LOSE BATTLE ON 'EXCLUSIVE REPRESENTATION'.

Chicago—The U. S. Court of Appeals for the Seventh Circuit has thwarted a bid by the Terminal Railroad Association of St. Louis and the BLE to force exclusive BLE representation on Terminal engineers in grievance and time claim cases.

In ruling in favor of the employes who brought suit, the Court broke up an alliance between the BLE and the carriers which was formed to block the BLF&E from giving its engineer members the aggressive representation the members felt they should receive.

Three Court of Appeals judges concurred in reversing a lower court decision which upheld a November 15, 1965, agreement between the Terminal and the BLE. The agreement, which the Appeals Court found to be in violation of the Railway Labor Act, coerced engineers into BLE representation when the engineers wished to be represented by the BLF&E.

Noting that many of the engineers on the Terminal had apparently preferred BLF&E representation and customarily received it in minor disputes until the agreement, the Court of Appeals ruled that the engineers involved may choose the union they wish.

The case went to court after 17 Terminal employes who were working as engineers filed time claims which were denied and then appealed by the BLF&E. The Terminal refused to handle the appeals because management said that only the BLE could represent the engineers.

Apparently feeling the BLE representation was no representation, 52 Terminal employes brought suit. The BLF&E was not a party to the suit, although the 52 plaintiffs made it clear that they preferred representation in grievances by that organization.

In rendering its opinion in favor of the employes, the Court of Appeals upheld the right of the engineers involved to "designate that union (BLF&E) to represent them on the Terminal property and before the National Railroad Adjustment Board with reference to time claims and disciplinary investigations occurring while plaintiffs performed the services of locomotive engineers."

The Court also noted that Section 2, Second, of the Railway Labor Act provides that an individual employe has the right to prosecute his grievances through any representative he may designate.

The Court recalled an earlier landmark case which determined that the railroad employes' rights under the Act cannot be nullified merely by agreement between the carrier and the union.

"Under that interpretation of the Act," the Court held, "it is clear that the Terminal and Engineers cannot nullify these plaintiffs' rights to select the Firemen's union as their representative for grievance purposes."

The three Court of Appeals judges concluded their opinion by noting "our decision means that members of the Firemen's union may have their union represent them in grievances arising while they work as engineers. . . ."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. 81

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

vs.

JOHN P. McELROY, et al.,
and
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondents.

No. 128

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, et al.,
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

BRIEF IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1417.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

vs.

JOHN P. McELROY, et al.,

and

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondents.

No. 1466.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, et al.,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

BRIEF IN OPPOSITION.

QUESTION PRESENTED.

Whether the Railway Labor Act, as construed by prior decisions of this Court, permits an engineman employee of a carrier, having seniority both as fireman and engineer, to designate the craft representative of firemen (BLF&E), to which he belongs, as his representative in the handling of his personal grievance or time claim arising while he was working as an engineer, a practice which was uniformly recognized in the railroad industry for fifty years, and which was sustained

by the decision below, or whether the craft representative of engineers (BofLE) and the carrier (Terminal) have the statutory right to nullify this practice by agreement that only the BofLE may represent such engineman in his minor dispute.

STATUTE INVOLVED.

In addition to the statutory provisions raised by petitioners, Section 2 Eleventh (c) of the Railway Labor Act (45 U. S. C., § 152 Eleventh (c)) is also involved and is set forth in Appendix A hereto.

ARGUMENT.

1. The point urged by petitioners, that the craft representative under the Railway Labor Act should be vested with exclusive authority in the handling of grievances, was long ago settled adversely to petitioners' contention in **Elgin Joliet & Eastern R. Co. v. Burley** (1945), 325 U. S. 711. In a comprehensive analysis of the representation provisions of the Railway Labor Act, the Court in Burley concluded, 325 U. S. at 739-741, that the Act did not vest in the craft representative any right of representation in the handling of minor disputes, such as individual grievances and time claims, but rather vested in the individual employee himself the right of control in those matters.[1]

The argument advanced by petitioners that the handling of grievances should be considered a part of the collective bargaining process and as such vested in the craft representative is the identical argument made in Burley and rejected because the statutory scheme was otherwise.

> "Petitioners' contrary view, as has been indicated, regards the settlement of grievances as part of the collective bargaining power, indistinguishable from the making of collective agreements. The assumption ignores the major difference which the Act has drawn between those functions, both in defining them and in the modes provided for settlement." 325 U. S. at 739.

The scope of the ruling in that case, that control over grievance matters was vested in the employee, and not in

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[1] This construction of the Railway Labor Act was recently applied in **Brotherhood of Railroad Trainmen v. Akron & BRR Co.** (D. C. Cir. 1967), 385 F. (2) 581, 603-4, cert. den., litigation which followed the expiration of Arbitration Award 282 under Public Law 88-108.

the craft representative, was not confined to proceedings before the National Railroad Adjustment Board, as B&LE suggests, but applies to the totality of grievance procedures. 325 U. S. at 729 and 739-741. And the rights so vested in employees cannot be destroyed by the collective agreement. 325 U. S. at 744. The **Burley** case stands as an insuperable barrier to petitioners' contention.

Subsequently, in **Pennsylvania R. Co. v. Rychlik,** (1957), 352 U. S. 480, this Court construed the 1951 union shop amendment to the Railway Labor Act, Section 2 Eleventh (45 U. S. C., § 152 Eleventh). In reviewing the legislative history of the amendment, it was pointed out that subsection (c) was added to solve problems of job mobility in train and engine service. While disputes have arisen concerning the application of this subsection in other fact settings, there can be no doubt that Section 2 Eleventh (c) permits the individual respondents, while working as engineers, to satisfy a union security agreement pertaining to engineers by maintaining membership in BLF&E, the craft representative of firemen on Terminal.[2]

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[2] BofLE itself so construed Section 2 Eleventh (c) and for that reason opposed its enactment, being the only railroad labor organization to take that position. **O'Connell v. Erie Lackawanna R. R.** (2d Cir. 1968), 391 F. (2) 156 at 161; 96 Cong. Rec. 16329-16330, 17052. Its continued opposition and efforts to frustrate the legislative intent are manifest in this litigation. Under even the most narrow construction of Section 2 Eleventh (c), being that which was urged and rejected in the **O'Connell** case and in **Birkholz v. Dirks** (7th Cir. 1968), 391 F. (2) 289, the fact that these respondents have interchangeable rights as firemen and engineers, and that BLF&E is craft representative of firemen, is all that is necessary to permit them to maintain membership in BLF&E while working as engineers. Since the right of respondents to maintain membership in BLF&E is not at issue here, but only the benefits flowing from that right, we do not pursue BofLE's allegation that none of the respondents is likely to be called to work as a fireman, except to note (a) to limit the statutory right to only those enginemen who, under local conditions at any given time, may likely be called to work as a fireman, would make the exercise

The Court below held as an independent ground for its decision that the statutory right of membership provided in Section 2 Eleventh (c) was not intended by Congress to be empty and meaningless, but that it carried with it benefits of membership, including the right to call upon the organization for representation in minor disputes. In so holding, the Court below was entirely consistent with the decisions in **Burley** and **Rychlik.**

The effect of the Court of Appeals decision is simply to restore to the individual respondents a right that had been universally recognized in the railroad industry for at least fifty years, that is, the right of an engineman employee to call upon whichever of the engine service organizations he maintained membership in to represent him in his individual grievance or time claim.[3]

There is overwhelming statutory support for the Court of Appeals decision in the language of the applicable provisions of the Railway Labor Act, particularly in the light of the **Burley** decision and the customs and practices in effect when these provisions were adopted. Thus, Section 2 Second requires that all disputes "be considered * * * in conference between representatives designated * * * respectively, by the carrier or carriers and by the employees thereof interested in the dispute"; Section 2

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of that statutory right uncertain and transitory, leading to turmoil and dispute and the inevitable necessity of maintaining dual union memberships or of frequently changing unions, which was exactly what Congress and the participating unions sought to avoid; and (b) since the rule permitting waiver of promotion rights was abrogated in 1950, the so-called "fixtures" filling assignments on the Terminal are being eliminated by attrition.

[3] Walker D. Hines, Director General of Railroads, by order dated Aug. 29, 1919, imposed on all railroads under Federal control this representation rule which had resulted from a 1913 agreement between B. of L. E. and B. L. F. & E. (Appendix B). This was in effect on the Terminal property until the agreement of Nov. 15, 1965 between BofLE and Terminal.

Third forbids "interference, influence, or coercion by either party over the designation of representatives by the other"; Section 2 Sixth requires the designated representatives to confer; Section 2 Eleventh (c) permits the individual respondents to satisfy BofLE's union security agreement by membership in BLF&E; and Section 3 First (i) requires that minor disputes be handled in "the usual manner" at the company level.

The statutory language, the historical customs and practices in the industry, and the **Burley** decision establish beyond doubt that no other result than that reached by the Court below could be justified and review is not called for.

2. Petitioner's complaint that the decision here cannot be reconciled with four prior decisions of the Courts of Appeals is wholly without merit. Two of these cases are earlier decisions of the Seventh Circuit itself, and all of them are distinguishable on facts and issues.

Since the earlier Seventh Circuit decisions would not result in a conflict between circuits even if they were not distinguishable, and since, additionally, the Court below did adequately and properly distinguish them, we consider here only the Eighth Circuit cases, **Brooks v. Chicago, R. I. & P. R. Co.** (1949), 177 F. (2) 385 and **Butler v. Thompson** (1951), 192 F. (2) 831. With respect to these cases the following should be noted:

(a) Neither case presented a fact situation involving craft mobility or the application of Section 2 Eleventh (c), which forms an independent ground sustaining the decision here.

(b) Both cases involved actions for re-instatement. **Butler v. Thompson** turned on jurisdiction, affirming a judgment of dismissal based on the holding in **Slocum v.**

Delaware L & W R. Co., 339 U. S. 239, that exclusive jurisdiction lay in the National Railroad Adjustment Board; **Brooks** was decided on the fact finding that discharge was occasioned by plaintiff's misconduct. The discussions concerning grievance procedure in each case was dictum.

(c) Neither case considered the decision of this Court in **Elgin, Joliet & Eastern R. Co. v. Burley**, 325 U. S. 711, which controls the point raised by petitioners concerning the rights of the craft representative in grievance matters. To the extent either Eighth Circuit case could be construed to be in conflict with the decision here and to support petitioners' position, it would to that extent in turn be in conflict with **Burley.**

(d) Neither case involved the historical practice of representation found in the engine crafts, antedating the adoption of the Railway Labor Act and applicable amendments, and which undoubtedly influence the construction of the representation provisions of the Act insofar as the engine crafts are concerned.

There is no conflict in decision with the cases cited by petitioners.

3. With respect to the petition of Terminal, it is astonishing that that petitioner has totally closed its eyes to the existence of subsection (c) of Section 2 Eleventh, under which these respondents have the statutory right to belong to BLF&E, the constantly referred to "minority union", while working as engineers. Not once does Terminal even mention this legislative enactment, even though it forms an independent ground of decision of the Court below.

Neither does Terminal admit to the fact that the representation practice it complains of, and sought to termi-

nate with its November 15, 1965 agreement with BofLE, has existed throughout the railroad industry for over fifty years. Only one resort to the courts resulted, in which an earlier attempt by BofLE to accomplish much the same results it seeks in this litigation was rebuffed. **General Committee v. Southern Pacific Co.** (9th Cir. 1942), 132 F. (2) 194, rev. on jurisdictional grounds, 320 U. S. 338. Since the decision of this Court in **Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co.** (1957), 353 U. S. 30, eliminated the strike threat in minor disputes, it is obvious that labor peace is not threatened by the continuation of a representation practice that has endured for over half a century.

The decision in **Burley**, criticized by Terminal, nevertheless established the distinction between major and minor disputes and the role of the craft representative in each that has become the accepted norm in the railroad industry.[4] When Terminal entered into the November 15, 1965 agreement with BofLE, it had to recognize that BofLE had no statutory rights to represent engineers in grievance matters. Whatever right BofLE now claims results from that agreement. It is obvious that by entering into that agreement, Terminal sought to interfere, influence, and coerce these respondents in their choice of representatives in their grievances contrary to the express prohibition of section 2 Third of the Act.

We find it incredible that Terminal, not content to abide the result of this litigation with respect to the validity of its contract, has chosen instead to aggressively seek

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[4] **Conley v. Gibson** (1957), 355 U. S. 41, cited by Terminal, involved the refusal by the craft representative to represent Negro members of the craft, as a result of which they were discharged. There is no conflict between the finding in **Conley** of a "duty" to fairly represent the Negro minority, when representation is requested, and the decision in **Burley** that there is no "right" of representation in minor disputes, absent request and authorization.

the upset of long established practices that are supported by the language of the Railway Labor Act and the prior decisions of this Court. Regardless of its motivation, it ignores the fact that a principal purpose for the enactment of the Act was the elimination of carrier interference with its employees in the selection of representatives. **Texas & N. O. R. v. Brotherhood of Ry. & S. S. Clerks** (1930), 281 U. S. 548, 569.

The position of Terminal as petitioner is indefensible.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petitions for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents John P. McElroy, et al.

APPENDIX A.

Section 2 Eleventh (c) of the Railway Labor Act.

The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership; **Provided, however,** That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: **Provided, further,** That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

APPENDIX B.

United States Railroad Administration,
Walker D. Hines, Director General of Railroads.

Washington, August 29, 1919.

Gentlemen:

After carefully considering the proposal to adopt certain rules from what is known as the Chicago Agreement between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Fireman and Enginemen, including a consideration of your letters to Mr. Tyler on the subject, I have concluded that the advantages to the railroads from the adoption of such part of this agreement as we are asked to adopt sufficiently outweigh any possible disadvantage as to fully justify the adoption of these rules for all railroads in Federal control, effective as of September 1st, 1919.

Won't you please, therefore, instruct Federal Managers and General Managers that the following rules of the Chicago Joint Agreement are adopted and are to be written into the schedules of the engineers and firemen on all railroads in Federal control where such schedules exist and where they are not already included in such schedules.

Would call your particular attention to the fact that paragraph (*f*) of Article 11, relating to a monthly guarantee for extra engineers and firemen is not included.

Rules from Chicago Joint Agreement between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, to be incorporated in existing schedules on railroads where such schedules exist and where they are not already included in such schedules.

Representation Rule.

The right of any Engineer, Fireman or Hostler to have the regularly constituted committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Company and the General Committee making the same, is conceded; provided, when a member of either organization has a grievance, which the local committee of his organization is unable to adjust with the local officers of the Company, the matter shall be handled by the two General Chairmen, who shall work jointly in handling such grievance to its final conclusion.

* * * * * * *

Yours very truly,

(Signed) Walker D. Hines,
Director General of Railroads.

Mr. R. H. Aishton, Chicago, Ill.
Mr. B. F. Bush, St. Louis, Mo.
Mr. A. T. Hardin, New York, N. Y.
Mr. Hale Holden, Chicago, Ill.
Mr. N. D. Maher, Roanoke, Va.
Mr. C. H. Markham, Philadelphia, Pa.
Mr. B. L. Winchell, Atlanta, Ga.

IPREME COURT. U. S.

FILED
SEP 6 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. 128

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, et al.,
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1466.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, et al.,
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents McElroy et al. ("Respondents") raise three basic points in their brief in opposition to Petitioner's petition for writ of certiorari:

a. Whether Terminal Railroad of St. Louis ("TRRA") has the statutory right to enter into agreement with the duly authorized bargaining agent of its locomotive engineers, the Brotherhood of Locomotive Engineers ("BLE"), concerning the manner of representation at pre-National Railway Adjustment Board ("NRAB") grievance proceedings.

b. That no conflict exists between the decision of the Seventh Circuit in this case and decisions of the Eighth Circuit on the same subject.

c. That Section 2 Eleventh (c) of the Railway Labor Act (45 U. S. C. A., Section 152 Eleventh (c)) grants Respondents the right to belong to the Brotherhood of Locomotive Firemen and Enginemen ("BLF&E"), and the Agreement between TRRA and BLE restricting representation of engineers at pre-NRAB grievance proceedings to the duly elected bargaining representative of the engineers interferes and coerces respondents in their choice of representative, contrary to Section 2 Third of the Railway Labor Act (45 U. S. C. A., Section 152 Third).

We shall show that those contentions are without substance, but even if it were otherwise, that does not detract from the compelling need for review of the decision below by this Court. Respondents have not challenged Petitioner's point that the Court below by requiring TRRA to confer and adjust the grievances of its engineer employees with a rival minority union, BLF&E, will greatly contribute to "confusion in administration" of the collective agreements and "introduce that strife between rival unions which was one of the chief purposes of the Act to prevent." **Douds v. Local 1250**, 173 F. 2d 764, 771 (C. A. 2nd, 1949).

1. TRRA and BLE have entered into an agreement relating to representation of engineers at pre-NRAB grievance proceedings. Without restricting the employee's individual right to represent himself on company level grievance matters, TRRA and BLE have provided that the BLE, as duly elected bargaining representative of TRRA's engineers, shall be the representative of the engineers at company property level grievance discussions.

Respondents argue that TRRA has no statutory right to enter into such an agreement. In the alternative, Re-

spondents argue that they have a right to select whomever they choose as their representative at company level discussions. Their argument is not correct.

First, TRRA needs no statutory authority to enter into agreement with BLE concerning representation of employees at pre-NRAB grievance proceedings.

Second, Respondents have no statutory rights relating to the selection of representatives at pre-NRAB level grievance discussions.

Unless the Railway Labor Act specifically gives the Respondents the right to choose their representatives at pre-NRAB grievance discussions, no such right exists. **General Committee, BLE v. Missouri-Kansas-Texas Railroad Co.**, 320 U. S. 323, 330 (1943).

In the **M-K-T** case, the Court stated, l. c. 337:

> "The conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.
>
> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the Courts should be implied."

There is simply no statutory authority which gives respondents the right of choice of representation at the property level grievance proceedings. The Seventh Circuit itself recognized that fact in **Edwards v. St. Louis-San Francisco Railway Co.**, 361 F. 2d 946 (C. A. 7th, 1966), where it said, l. c. 953, 954:

"The provisions of the Railway Labor Act govern neither the procedure by which a carrier may discharge its employees nor the conduct of an investigation hearing on railroad property.

* * * * * * * *

"The Federal Courts are not guarantors of any rights either of labor or management at the initial hearing, either by force of the Constitution or the Railway Labor Act, for, as we have said, at that stage the dispute is between private parties and the applicable procedure for settling the dispute is governed by the contract between them."

The Seventh Circuit in the **Edwards** case further emphasized that the Railway Labor Act does not "regulate the grievance procedures at the company level, procedures heretofore left to the company and the employees to devise for themselves" (l. c. 955).

TRRA and BLE, in making contract relating to representation at pre-NRAB grievance proceedings, have merely followed the bargaining process to which they have a right. Respondents have no right to interfere with the rights exerted by TRRA.

Respondents rely on **Elgin, Joliet & Eastern Ry. Co. v. Burley**, 325 U. S. 711 (1945), as chief support for their position that the action by TRRA and BLE entering into the agreement of November 15, 1965 is in some way unlawful and violates the Railway Labor Act. Respondents suggest that the **Burley** case stands for individual rights of railroad employees. **Burley** does indeed hold that the individual employee has certain rights under the Railway Labor Act and that the duly authorized bargaining agent cannot strip the individual of his guaranteed rights. However, the joint action of TRRA and BLE, as pointed out above, has not deprived the individual employee of

any right granted to him as an individual by the Railway Labor Act. In short, the **Burley** case has no application to the case at hand. It simply stands for the proposition that a collective bargaining agent may not settle accrued claims of the individual employee without the employee's approval or at least in the face of the employee's opposition to such settlement of the claim. The **Burley** case, particularly in the opinion on reargument at 327 U. S. 661, says that if the employee does not want the collective bargaining agent to handle a claim for him, then the collective bargaining agent will not be permitted to settle such claim. **Burley** presents a far different issue than exists in this case, for here, the employer and the collective bargaining agent have said that if the employee wishes to have representation in the matter of the handling of certain claims, then he shall have the BLE represent him. In the case at hand, if the individual employee does not wish to have representation by the BLE in the handling of claims, there is no compulsion on his part to have the BLE handle his claims, and there is certainly no restriction on his choice to represent himself in the matter of handling claims at the pre-NRAB level.

The only right granted to Respondents under the Railway Labor Act concerning representation at pre-Board level grievance and time claim proceedings concerns the right of the individual to represent himself. There has been no invasion of this right.

2. Respondents assert that the Seventh Circuit's decision in this case, which would allow a minority union to represent employees at company level discussions, does not conflict with decisions of other circuits.

The matter of such conflict between circuits was detailed in TRRA's Petition for Writ of Certiorari. The existence of such conflict is obvious. In **Butler v. Thompson**, 192 F. 2d 831 (C. A. 8th, 1951), the Eighth Circuit,

in ruling on pre-NRAB grievance proceedings agreement between a carrier and bargaining agent, stated l. c. 833:

> "The statute recognizes a distinction between proceedings on the company level and those before the Adjustment Board when there is in effect a collective bargaining contract. In investigations, conferences or hearings by or before officers of the carrier an exacting legal contract controls, whereas the procedure before the Board is governed by the statute."

In **Brooks v. Chicago, R. I. & P. R. Co.**, 177 F. 2d 385 (C. A. 8th, 1949), the Eighth Circuit stated at page 391:

> "The Railway Labor Act does not empower courts to enforce against railroads any prescribed procedure for investigating and discharging its employees. . . ."

The Second, Fifth and Eighth Circuits have also positively held that a company is not required to discuss grievance procedures with a minority union at company level grievance proceedings under the National Labor Relations Act. **National Labor Relations Board v. Posner**, 342 F. 2d 826, 829 (C. A. 2nd, 1965); **Hughes Tool Co. v. National Labor Relations Board**, 147 F. 2d 69 (C. A. 5th, 1945); **National Labor Relations Board v. Blades Mfg. Co.**, 344 F. 2d 998, 1004 (C. A. 8th, 1965).

Opposed to the decisions of the Second, Fifth and Eighth Circuits, and particularly the Eighth Circuit, which have upheld agreements similar to that which TRRA and BLE have entered into concerning representation at company level grievance discussions, is the decision of the Seventh Circuit in this case which says such agreement is improper.

Since TRRA's operations are divided between Illinois and Missouri and are therefore included within the Seventh and Eighth Circuits, the conflict in decisions be-

tween the circuits genuinely affects TRRA. It is therefore most important that the Supreme Court grant TRRA's petition for writ of certiorari so that the conflict between circuits may be resolved.

3. Respondents seem to imply in their reply brief that TRRA has no right to petition for writ of certiorari in this case; that TRRA is by some means guilty of coercing respondents in their choice of bargaining agents, which would be improper under Section 2 Eleventh (c) of the Railway Labor Act (45 U. S. C. A., Section 152 Eleventh (c)). This, of course, cannot be true, as the agreement between TRRA and BLE is but part of the collective bargaining procedure between the carrier and the duly authorized bargaining agent for TRRA's engineers. The agreement between TRRA and BLE concerning the handling of grievances at pre-NRAB grievance discussions has nothing to do with the selection of the bargaining agent and is a matter only between the bargaining agent and the carrier.

Respondents also claim to be astonished at TRRA's failure to refer to Section 2 Eleventh (c) of the Railway Labor Act in its Petition. The simple fact is that 2 Eleventh (c) has no application to this case. Section 2 Eleventh (c) has a very limited purpose—"to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily exchanges crafts." **Pennsylvania R. Co. v. Rychlik,** 352 U. S. 480, 488 (1957).

BLE is the duly elected bargaining representative of engineers employed by TRRA. The agreement between TRRA and BLE concerning pre-NRAB grievance proceedings discussions has nothing to do with the selection of the bargaining agent and does not alter the fact that respondents, as members of BLF&E, do not have to change unions when working as engineers for TRRA.

Section 2 Eleventh (c) of the Railway Labor Act, which eliminates compulsory dual unionism, is simply not concerned with this case.

CONCLUSION.

For the reasons contained in this reply brief and as set forth in TRRA's petition to this Court for writ of certiorari, writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 81

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

JOHN P. McELROY, ET AL.

No. 128

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, PETITIONER

v.

JOHN P. McELROY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of October 14, 1968, inviting the Solicitor General to express the views of the United States with respect to these cases.

OPINIONS BELOW

The opinion of the district court is not reported. The opinion of the court of appeals is reported at 392 F. 2d 966.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1968. The petition for a writ of certiorari in No. 81 was filed on May 10, 1968, and in No. 128 on May 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether members of the Brotherhood of Locomotive Firemen and Enginemen who work both as locomotive firemen and locomotive engineers may designate their union to represent them in grievance disputes which arise during their work as engineers, or whether they may be represented only by the Brotherhood of Locomotive Engineers, the collective bargaining agent which represents the engineers' craft under a collective bargaining agreement which provides that it alone may represent employees in grievance proceedings arising out of their work as engineers.

STATEMENT

The respondents, plaintiffs in the district court, are members of the Brotherhood of Locomotive Firemen and Enginemen ("Firemen's Union") and employees of the Terminal Railroad Association of St. Louis ("Terminal"). They have seniority status both as firemen and as engineers, and rotate between the two crafts depending upon Terminal's needs (Pet. App. 24–25).[1] While working as firemen, their collective bargaining representative is the Firemen's Union and

[1] "Pet. App." references are to the appendix to the petition in No. 128.

their rates of pay and working conditions are established by the contract between that union and Terminal. While working as engineers, their collective bargaining representative is the Brotherhood of Locomotive Engineers ("Engineers' Union"), and their rates of pay and working conditions are established by its contract with Terminal (Pet. App. 25). By virtue of Section 2, Eleventh (c), of the Railway Labor Act, 45 U.S.C. 152, Eleventh (c), they need not join the Engineers' Union to work as engineers, but may maintain single union membership in the Firemen's Union, as they have chosen to do.[2] Until recently, Terminal permitted that union to represent its members in all grievance or disciplinary problems arising out of their work, without regard to whether it was work as firemen or as engineers (Pet. App. 26).

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[2] In our opinion, this case does not involve the issue presented in *Birkholz* v. *Dirks*, 391 F. 2d 289 (C.A. 7), certiorari granted, October 14, 1968, No. 172, this Term, and *O'Connell* v. *Erie Lackawanna R. Co.*, 391 F. 2d 156 (C.A. 2), certiorari granted, October 14, 1968, No. 158, this Term. The question there is whether the effect of Section 2, Eleventh (c), must be limited to the classic situation, intercraft mobility in which two or more unions are bargaining agents for crafts or classes of employees on the same railroad, and one union then seeks to enforce a union shop agreement against members of the other unions who occasionally work in its craft. Both courts recognized that the intercraft mobility problem was the principal spur to enactment of Section 2, Eleventh (c), 391 F. 2d at 291, and 159, and see *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480, 489 ff., but refused so to limit its application in view of its broader language and legislative history. In the present case, the classic situation is present—plaintiffs are mobile between two crafts, each of which is represented in dealings with the employer by a different union—and therefore Section 2, Eleventh (c), must apply, whatever construction is given it in the pending cases.

On November 15, 1965, Terminal and the Engineers' Union entered into a collective bargaining agreement for the engineers' craft; it provided, *inter alia,* that only the Engineers' Union could represent Terminal's employees in grievance and disciplinary matters arising out of their work as locomotive engineers. Subsequently, a number of the respondents wished to file grievances concerning the amount and rate of pay applicable to time they worked as engineers (Pet. App. 25), and designated the Firemen's Union to represent them in the processing of these claims. Terminal's officials refused to deal with the Firemen's Union, on the ground that Terminal's agreement with the Engineers' Union precluded such representation (*ibid.*).

Respondents then brought this suit in the United States District Court for the Eastern District of Illinois seeking to have declared invalid, as violating the Railway Labor Act, 45 U.S.C. 151 *et seq.*, the provision of the agreement purporting to limit their right to designate the representative of their choice in grievance and disciplinary matters. The district court dismissed the action for want of jurisdiction (Pet. App. 21–23). The Court of Appeals for the Seventh Circuit reversed, holding that there was federal court jurisdiction and, on the merits, that the challenged provision was invalid because in conflict with the Railway Labor Act. Terminal and the Engineers' Union have each petitioned for a writ of certiorari to review this decision.

DISCUSSION

1. An initial question, not raised in the papers here, is whether the employees' claim to the privilege of choosing their own representative for the prosecution of grievance claims before their employer is appropriate for federal court resolution, or is a jurisdictional dispute between unions left by Congress to other tribunals. In general, this Court has found justiciability lacking where the question raised is one specifically reserved to the National Mediation Board, such as representation of employees for collective bargaining purposes, Section 2, Ninth, of the Act, 45 U.S.C. 152, Ninth, and union jurisdictional disputes related thereto. *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650; *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297; *General Committee* v. *Missouri-K.-T.R. Co.,* 320 U.S. 323. On the other hand, it has found to be justiciable a number of cases where individual employees sought to vindicate rights claimed to have been granted to them under the Act, yet limited by a collective bargaining agreement. See *Felter* v. *Southern Pacific Co.,* 359 U.S. 326, 327, n. 3; *Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774; *Tunstall* v. *Brotherhood,* 323 U.S. 210, 213; *Steele* v. *L. & N. R. Co.,* 323 U.S. 192, 205–207. In the present case, individual employees are claiming a right under the Act to designate representatives of their choice for the purpose of prosecuting their grievance and disciplinary claims, so-called "minor disputes" that are not subject to National Mediation Board jurisdiction, see *infra.* Accordingly, their claims appear to be justiciable.

General Committee v. *Southern Pacific Co.*, 320 U.S. 338, is not inconsistent with this conclusion. In that case, too, the question was who would represent members of the Firemen's Union, working as engineers, in handling their grievance claims. There, however, the Firemen's Union and the Engineers' Union were the opposing parties in the suit, and the Court believed that each was seeking *exclusive* rights of representation, 320 U.S. at 343. Although the Court held that that action was not justiciable, it specifically left open the question "[w]hether different considerations would be applicable in case an employee were asserting that the Act gave him the privilege of choosing his own representative for the prosecution of his claims," *id.* at 344. That question, we believe, was subsequently resolved by *Felter* and the other cited cases in favor of justiciability. Respondents' claim here is simply for the privilege of choice. Accordingly, this action cannot be characterized as a jurisdictional controversy and was correctly held to present a justiciable question.

2. The court of appeals correctly held that the different treatment in the Railway Labor Act of major and minor disputes authorizes employees to be represented in the latter by their own union even though that union could not represent them in major disputes.

In *Elgin, J. & E.R. Co.* v. *Burley*, 325 U.S. 711, adhered to on rehearing, 327 U.S. 661, the Court considered employees' rights to representation in minor disputes, *i.e.*, in disputes involving grievances or the interpretation of agreements covering rates of pay,

rules or working conditions. In that case, the National Railroad Adjustment Board had ruled that a settlement between the collective bargaining representative and the carrier precluded individual employees from pursuing money claims against the carrier arising out of the interpretation of the collective bargaining contract, despite the assertion by the employees that the union had no authority to settle these claims on their behalf. This Court in *Elgin* pointed out that under the Railway Labor Act there is a sharp distinction between such "minor disputes" and "major disputes" concerning the formation of collective agreements setting rates of pay, rules and working conditions (325 U.S. at 722–728, 739–740). Under the Act, the latter may be resolved through "mediation and conciliation only, * * * under the auspices of the [National] Mediation Board" (*id.* at 727), and a single collective bargaining agent has the right to represent the entire craft or class of employees, 45 U.S.C. 152, Fourth, Ninth. However, Sections 2, Fourth, and 3, First(j), of the Act, 45 U.S.C. 152, Fourth, and 153, First(j), give the employees the right to appear personally in minor disputes (*id.* at 729–731), and these disputes are eventually resolved by compulsory arbitration before the Adjustment Board (*id.* at 727). These differences, and the fact that the collective interests of the majority may be opposed to the interests of the individual (see 325 U.S. at 736), led the Court to conclude that Congress had intended to preserve the individ-

ual's right to represent himself in grievance proceedings.[3]

Elgin involved the individual employees' right to represent himself in minor disputes, whereas here the issue is the employee's right to designate another—in fact, the union of which he is a member—to do so. However, the *Elgin* holding that the collective bargaining agent's exclusive right to represent employees in the craft extends only to major disputes and does not encompass minor disputes, is based upon the broad scheme of the Act and thus supports the decision here.

Each reference in the Act to the processing of minor disputes also refers to "representatives" which the employees concerned may designate. Sections 2, Second, Third, Fourth (Proviso), and Sixth, and 3, First (j), of the Act, 45 U.S.C. 152, Second, Third, Fourth (Proviso) and Sixth, and 153, First (j). The term "representative" is defined quite broadly in Section 1, Sixth, of the Act, 45 U.S.C. 151, Sixth, as

[3] The rehearing in *Elgin* was occasioned by a dispute as to the evidence required to show that a collective bargaining agent did or did not have authority to settle an employee's grievance claim under its contract, a matter not in issue here. In one respect, however, the Court's opinion on rehearing appears to have strengthened respondents' claim. Section 3, First (i), of the Act, 45 U.S.C. 153, First (i), provides that in preliminary stages, grievance disputes "shall be handled in the usual manner"; the Court understood this to embody a Congressional view that custom and usage were entitled to weight in considering representation questions arising out of grievance disputes. 327 U.S. at 663. As respondents point out, it has been customary for the Firemen's Union to represent its members in grievance disputes, whether they were working as engineers or firemen at the time.

"any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them." The various references to employee representatives are then qualified in differing ways. The representative for major disputes is described in the main body of Section 2, Fourth, as one determined by the "majority of any craft." By contrast, the references to the representatives for the purpose of processing minor disputes are described in terms indicating an unfettered right of designation. For example, Section 2, Second, refers to a representative designated by the employees "interested in the dispute"; Section 2, Fourth (Proviso), to "local representatives of employees"; and Section 3, First (j), to "other representatives, as they may respectively elect."[4]

Indeed, this Court appears to have interpreted this last phrase to mean that at the ultimate stage of the grievance process, the binding determination by the Adjustment Board, employees can be represented by whomever they chose. *General Committee* v. *Southern Pacific Co., supra,* 320 U.S. at 343 and n. 3; *Elgin, J. & E. R. Co., supra,* 325 U.S. at 729 ff. Since employees can appoint representatives at earlier stages in the grievance process under the statute, they should be

[4] The legislative history of the 1934 amendments to the Act, which added the provisions here involved, contains little discussion of the right of representation in minor disputes. However, the hearings do reflect the understanding that, with respect to minor disputes, "the individual may in person or by counsel of his own choosing of [or ?] other representative, prosecute his grievances." Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 89; see also *id.* at 33, 44.

able to choose the same representative they could have before the Adjustment Board. This argument is strengthened here by two additional considerations: First, the choice the employees actually wish to make is one sanctioned by custom and usage, and hence within the reference of Section Three, First (i), to handling of minor disputes "in the usual manner." (See n. 3, p. 8, *supra.*) Second, the ruling the Engineers' Union seeks will reduce the value to respondents of their membership in the Firemen's Union and enhance the value of membership in the Engineers' Union. This encouragement to dual union membership, achieved by the Engineers' Union's control of collective bargaining for its craft, seems just the sort of pressure which it was the purpose of Section 2, Eleventh (c), to avoid.

3. The only authority on the issue involved here supports the decision of the court below. Two courts of appeals had already come to this result before *Elgin. General Committee* v. *Southern Pacific Co.*, 132 F. 2d 194, 199 (C.A. 9), reversed on jurisdictional grounds, 320 U.S. 338; *Estes* v. *Union Terminal Co.*, 89 F. 2d 768, 770 (C.A. 5) (dictum); see also *Brotherhood of Locomotive Engineers* v. *Denver & R.G.W.R.R.*, Civil Action No. C–717 (D. Colo., September 9, 1968, appeal pending), following the Seventh Circuit's holding in this case. Shortly after *Elgin* was decided, the Attorney General issued an opinion upholding the employees' right freely to designate their representatives in the processing of minor disputes. 40 Op. A.G. 494.

Petitioners err in asserting that there is a conflict on the issue among the circuits. *Brooks* v. *Chicago, R.I. & P.R. Co.*, 177 F. 2d 385 (C.A. 8), was a reinstatement and back pay action; one of the grounds for error was the assertion that the employee was denied the right to counsel of his own race. The court held that it had no power to prescribe procedure for disciplinary hearings or to issue reinstatement orders; it went on to decide on the merits that "the fault of the appellant was the sole and efficient cause of the loss of his employment with the railroad * * *." 177 F. 2d at 391. Similarly, *Butler* v. *Thompson*, 192 F. 2d 831 (C.A. 8), involved an action for reinstatement and back pay, and held that there was no jurisdiction to entertain such an action. The employee there wished to be represented by a union of which he was not a member, and the court in dictum stated that a contract provision providing the contrary would govern. 192 F. 2d at 833. The *Elgin* case was not discussed in either *Butler* or *Brooks*.

Finally, cases involving the National Labor Relations Act (*e.g.*, *National Labor Relations Board* v. *I. Posner, Inc.*, 342 F. 2d 826 (C.A. 2), certiorari denied, 382 U.S. 837; *Hughes Tool Co.* v. *National Labor Relations Board*, 147 F. 2d 69 (C.A. 5)) are not in point. Under that statute, the union and the employer can provide for any procedure they wish in handling minor disputes. See *Vaca* v. *Sipes*, 386 U.S. 171, 175 n. 3. The statute does not set up divergent procedures for major and minor disputes, as does the Railway Labor Act, and thus no need to protect the employees' right to designate representatives of their

choice for minor disputes is present. Nor is there apparent concern with preventing pressure toward dual union membership. Thus, the asserted conflict between the decision below and cases under the Labor Act is immaterial. See also, *Pennsylvania Railroad* v. *Rychlik, supra,* 352 U.S. 480, 493.

4. The Railway Labor Act was amended in 1966 by P.L. 89–456 to establish a new procedure for the processing of minor disputes. Any carrier or carrier group, or "any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter," may request the convening of a special adjustment board as an alternative to proceedings before the National Railroad Adjustment Board; this special board is to be composed of one member designated by the carrier(s), one member designated by "the representative of any craft or class of employees of such carrier," and, if necessary, a neutral agreed upon by the representatives or designated by the National Mediation Board. Section 3, Second, of the Act, as amended, 45 U.S.C. 153, Second (Supp. III). In opposing the amendments during hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, both railroad and union representatives remarked that they appeared to upset the existing accommodation regarding grievance resolution, in which employees in an intercraft mobility situation were represented by the union to which they belonged, whether or not it was the representative of the craft regarding which the dispute arose. Under the amendments, the spokesmen

feared, only the craft union would be able to demand a special board; others would be left to the more cumbersome processes of the Adjustment Board, creating pressure for a closed shop in each craft, and numerous jurisdictional disputes.[5]

For the purpose of this case, which arose before the amendments went into effect, one can regard this history as demonstrating the "usual manner" in which minor disputes have been settled, and apparent acceptance of the notion that discriminatory access to the grievance-settling process would raise the problem of pressure toward dual union membership which Section 2, Eleventh (c), seeks to avoid. Whether the amendments do create a preferential status for craft representatives in the future is itself an open question. In *Brotherhood of Locomotive Engineers* v. *Denver & R.G.W.R.R., supra,* p. 10, the district court found that the sole purpose of the legislation was to alleviate the backlog of cases before the Adjustment Board (see S. Rep. No. 1201, 89th Cong., 2d Sess., p. 2); to avoid conflict with Section 2, Eleventh (c), it interpreted the references in the amendments to "craft" or "class" representatives as being to *any* craft or class representative having an agreement with the employer, and not necessarily the craft or class in which the employee was working at the time the dispute arose. The meaning of the 1966 amendments is not in issue in this

[5] Hearings on H.R. 701, 704, and 706, Railway Labor Act Amendments Relating to NRAB, before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., pp. 199–200, 203–204, 218, 230.

case however; what is important here is that they do not foreclose the interpretation adopted by the Seventh Circuit.

In sum, the decision of the Seventh Circuit is correct, and there is no conflict among the circuits or other reason for further review. As this Court said with respect to another individual right protected by Section 2, Eleventh (b), of the Act, 45 U.S.C. 152, Eleventh (b), "Congress was specifically concerned with keeping these areas of individual choice off the bargaining table." *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 333. Similarly, in the instant cases, the individual employee's right to choose a representative in minor disputes should not be abridged by an agreement between his employer and a union to which he does not belong and which he is not required to join.[6]

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1968.

[6] Nothing in the decision of the Seventh Circuit indicates that the Engineers' Union will be foreclosed from prosecuting its interest in interpretation of the collective agreement in proceedings concerning grievances that arose while the employees were working as engineers. Cf. *Brotherhood of Locomotive Engineers* v. *Denver & R.G.W.R.R.*, *supra*, p. 10.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.
Nos. 81 and 128.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

vs.

JOHN P. McELROY, *et al.*,
Respondents.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, *et al.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONSE OF PETITIONER BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

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ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONSE OF PETITIONER BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

This response of petitioner Brotherhood of Locomotive Engineers ("BLE") is occasioned by the views of the United States with respect to these cases as expressed by the Solicitor General.

BLE believes that those expressions contained therein as to the merits of the questions presented by the petitioners are incorrect and merely reiterate the bases used by the court below in reaching its decision. It is submitted that those views fail to thoroughly respond to the very

basic question of railroad labor relations that has been directly raised in this case and which, therefore, would serve as an appropriate vehicle for this Court to provide long needed guidelines as to the authority of the craft bargaining representative in the railroad operating crafts in the collective bargaining process and the relation of the minority union thereto.

At the outset, it should be noted that the statement of the United States is necessarily colored by an unfounded predicate, that is, the assertion that all locomotive firemen and all locomotive engineers rotate between the two crafts and are in a constant state of mobility. Although this concept of "ebb and flow" between these two crafts appears to have been true when this Court decided *General Committee v. Missouri-K-T. R. Co.*, 320 U. S. 323 (1943), and *General Committee v. Southern Pacific Co.*, 320 U. S. 338 (1943), and may have led to some of the comments therein which have since reflected on the bargaining authority of BLE for the craft of engineers, it is no longer applicable or valid. A study undertaken by BLE and submitted to the District Court in *Brotherhood of Locomotive Engineers v. National Mediation Board*, 284 F. Supp. 344 (D. D.C. 1968, appeal pending) shows that the number of locomotive engineers shuttling between crafts may be less than six percent of the employees of the craft on some carriers and is only fourteen to nineteen percent of the engineer work force on all the nation's rail carriers.[1] This in part stems from the fact that the award of Arbitration Board No. 282, 41 LAB. ARB. 673, authorized the nation's carriers to eliminate up to ninety percent of firemen positions on freight and yard service. As a result the

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[1] See Appendix A, *infra*, taken from affidavit of C. J. Coughlin, First Assistant Grand Chief Engineer of BLE, to which chart was attached as appendix 18.

number of firemen were reduced from 38,000 in 1963 to 20,000 in 1966. See *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, 385 F. 2d 581, 610 (D.C. Cir. 1967). Stated another way, by 1966 there were seventy percent more engineers than firemen.[2] Accordingly, there is a shortage of engineers which becomes more acute as the older men are attrited from service, and the carriers are in most instances using all available employees as engineers except for passenger service and to protect vetoed firemen assignments.

In fact, as BLE previously informed the Court, there is no ebb and flow between the crafts of engineers and firemen on the Terminal Railroad. There are 318 locomotive engineers on the seniority roster, thirty-three of whom were directly hired as engineers after Award 282. The Terminal Railroad presently employs sixty-two "fixture firemen," *i.e.*, firemen who have waived rights for promotion and cannot therefore work as engineers. These firemen are employed on approximately twenty-three firemen assignments. Since these firemen employees have high seniority ranking as firemen and the assignments therein are limited, the thirty-three junior engineers and others above them on the engineers' seniority roster cannot flow back into the craft of firemen to obtain any work opportunities when business is slack.[3] It is therefore submitted that both the court below and the United States improperly reached the legal conclusion submitted on the

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[2] See also Appendix B, *infra*, taken from appendix 5 to Coughlin affidavit in *Brotherhood of Locomotive Engineers v. National Mediation Board, supra*, Civil Action No. 2020-66.

[3] See Appendix C, *infra*, affidavit of BLE General Chairman E. E. Watson, attached as appendix 9 to Coughlin affidavit in *Brotherhood of Locomotive Engineers v. National Mediation Board, supra*, Civil Action No. 2020-66.

basis of assuming that there is mobility between the crafts and that respondents rotate between them.

Though stating that the union shop cases of *Birkholz v. Dirks*, 391 F. 2d 289 (7th Cir.), *cert. granted*, October 14, 1968, No. 172, this Term, and *O'Connell v. Erie Lackawanna R. Co.*, 391 F. 2d 156 (2nd Cir.), *cert. granted*, October 14, 1968, No. 158, this Term, are inapplicable to the issue presented herein, the United States then attempts to support its theory by relying on a view of Section 2, Eleventh (c) of the Act which necessarily assumes that this Court will uphold the decisions of the courts of appeals in those cases. In addition, on page 3, n.2, of its brief, the United States apparently attempts to distinguish the question in the union shop cases on two bases: (1) there is only occasional work performed in the other craft; and (2) the employee's membership was in a union which is not a bargaining representative for any craft of employees on the same railroad. Those facts evidently take those cases out of the "classic situation." As previously noted, the respondents herein are not working in the craft represented by the union in which they hold membership. There is no intercraft mobility situation presented. Further, that the union to which the employee belongs holds the bargaining rights for another craft on the railroad does not seem critical in the Solicitor General's analysis; for at other times it is submitted that the employee may be represented in the grievance procedures at the carrier level by whomever he chooses, whether the union is a bargaining representative on that railroad or whether the employee is even a member of the union representing him. Thus, the case herein does not present the classic situation. However, the theory of the United States would be applicable to all other situations. Therefore, all railroad employees in both the operating and nonoperating crafts would be

entitled to be represented by whomever they choose in grievance handling. And even though the National Labor Relations Act cases are contended not to be in point, it is submitted that the rationale contained in the brief of the United States would encompass the employees governed by that Act.

While admitting that the decision in *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711 (1945), only involved the individual employee's right to represent himself in minor disputes, the decision, however, is interpreted in the broadest context possible to mean that the bargaining agent's authority extends only to major disputes. This view overlooks the following critical language contained in this Court's opinion:

> "We need not determine in this case whether Congress intended to leave the settlement of grievances altogether to the individual workers, excluding the collective agent entirely except as they may specifically authorize it to act for them, or intended it also to have voice in the settlement as representative of the collective interest." *Id.* at 737.

The Solicitor General would answer this question by saying that the collective agent is entirely excluded from the process. (Brief, p. 8).[4]

This Court expressed doubts about an unequivocal answer by further stating:

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[4] This expression would appear to sanction the individual contract theory rejected by the Court in *Order of RR. Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944) and *J. I. Case Co. v. Labor Board*, 321 U.S. 332 (1944). In the first case, the Court rejected the proposition that a valid contract between an individual and a carrier could be made to supersede the provisions of a collective agreement. The second case held that, after a collective agreement is made, nothing is left to individual agreement except the initial act of hiring.

> "To leave settlements in such cases ultimately to the several choices of the members, each according to his own desire without regard to the effect upon the collective interest, would mean that each affected worker would have the right to choose his own terms and to determine the meaning and effect of the collective agreement for himself. Necessarily, the carrier would be free to join with him in doing so and thus to bargain with each employee for whatever terms its economic power, pitted against his own, might induce him to accept. The result necessarily would be to make the agreement effective, not to all alike, but according to whatever varied interpretations individual workers, from equally varied motivations, might be willing to accept. To give the collective agent power to make the agreement, but exclude it from any voice whatever in its interpretation would go far toward destroying its uniform application." *Id.* at 737, n. 35.

In essence, the ultimate view advanced by the United States would entirely disregard the collective interest of the majority of employees who had selected their craft representative. However, this view is in conflict with the "continuing bargaining" theory adopted by this Court in the more recent cases. See *Conley v. Gibson,* 355 U.S. 41, 46 (1957); *Republic Steel Corp. v. Maddox,* 379 U. S. 650, 653 (1965).

In the latter connection, the United States has misread the import of BLE's reference to Section 9(a) of the National Labor Relations Act. Although the procedures of the two Acts may be somewhat different, the basic labor relations philosophy underlying both is not. The position taken by the court below and by the United States fails to protect the integrity of the collective bargaining agreement arising out of any adjustment of minor disputes and

fails to provide any place for participation by the bargaining representative. It would appear that the Railway Labor Act does not remove the two guarantees specifically expressed in Section 9(a) of the National Labor Relations Act. Rather Section 2 of the Railway Labor Act may be read as providing procedures no broader than under the National Labor Relations Act. If the theory of the amicus were accepted, Section 2, Seventh, may have little meaning and vitality. But, as this Court has stated with respect to the proper interpretation of Section 2, Eleventh (c) of the Act, even the disarmingly clear language of the statute may not be literally applied, when read not in a vacuum but in light of the policies intended to be served. See *Pennsylvania Railroad Co. v. Rychlik*, 352 U. S. 480, 488-489 (1957).

It is submitted that the BLE as collective bargaining representative of the craft has a right to participate in the grievance process on the property, a right which is not negated by the employees' freedom of choice in the settlement of their individual disputes; and, therefore, has the right to seek to be the exclusive representative for handling grievances on the property, except in those instances where the employee desires to represent himself. It is further submitted that the privilege of conferring with the individual employee, expressed in Section 2, Fourth, runs to the carrier; and, therefore, the latter may negotiate with the majority bargaining representative to limit the processing of grievances under the machinery established by the carrier and bargaining representative to the individual or the majority representative and to permit the bargaining representative to have a voice as to the contract's substantive obligations, always subject to the latter's duty not to engage in hostile discrimination. If the employee or group of employees is dissatisfied with the disposition of their

grievance, they would also have the right to submit the dispute to the Adjustment Board.

However, assuming employees can be represented by whomever they choose at the Adjustment Board stage of the minor dispute process, as contended by the United States, does not establish that employees are entitled to the same representation in the earlier stages. Although it is recognized that the Adjustment Board could render a binding award in conflict with the bargaining representative's opinion, the procedures and composition of the Board do partially eliminate the objections raised by the BLE herein. First, the Board seeks out the views of the bargaining agent as to the interpretation of the agreement as applied to the facts of the claim. Second, the bargaining agent has a representative on the tribunal, who participates in the discussion and decision in the matter. Third, the number of members on the division of the Board, here the First Division with ten members, and their removal from the immediate controversy on the property should insure, at least in most instances, an impartial outcome. In the instant case, the minority union to which respondents belong, the Brotherhood of Locomotive Firemen and Enginemen, also has a member on the First Division.

The United States also urges that the ruling sought by BLE "will reduce the value to respondents of their membership in the Firemen's Union and enhance the value of membership in the Engineers' Union." (Brief, p. 10). Conversely, it may be assumed that the theory expressed by the United States would enhance the value of membership in the Firemen's Union at the expense of reducing the value of membership in the BLE or any other bargaining agent for a craft—a purpose diametrically opposed to the basic philosophy of the statute which is to strengthen the role of the collective bargaining representa-

tive. And possibly more important, as this Court recognized in the previously cited quotations from *Elgin*, a carrier may dispose of minor disputes with a minority union in a manner that may reasonably tend to intimidate the employees in their choice of representation.[5]

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[5] Some comment may be warranted concerning the references to *Brotherhood of Locomotive Engineers v. Denver & Rio Grande W. R.R.*, Civil Action No. C-717 (D. Colo., Sept. 9, 1968, appeal pending). (Brief, pp. 10, 13, 14). There, BLE sought to enjoin the carrier and the Brotherhood of Locomotive Firemen and Enginemen, with the assistance of the National Mediation Board, from entering into an agreement to create a P.L. Board under P.L. 89-456 for the purpose of disposing of grievances that arose while the employees were working as engineers. The Firemen's Union, but not BLE as craft representative, would have the exclusive right to participate in the proceedings and to designate one of its officers as the sole labor member of the panel. The district court dismissed the complaint and cause of action on the basis that the controversy was not ripe for judicial determination in that the P.L. Board had not yet made an award on the merits of the grievances and the court would not presume (1) the Board would violate the terms of its establishing agreement, or (2) illegally engage in collective bargaining and interpretation of BLE's contract. The opinion indicated that if the collective agreement were ignored "serious and difficult questions under the Railway Labor Act and the due process clause of the Fifth Amendment would be raised" and implied that jurisdiction would then be accepted.

For purposes of this case, only two points need be raised. First, the amicus takes this decision to mean that BLE will have a remedy in prosecuting its interest in interpretation of the collective agreement after the P. L. Board enters an award. However, what avenues are open to BLE at that time? It would appear that BLE would have no standing to bring suit to set aside the award under Section 3, First (q); nor would it have any remedy under the provisions of Section 2 as those paragraphs are interpreted by the United States in its brief. But *cf. Transportation-Communication Employees Union v. Union Pacific R. Co.*, 385 U.S. 157 (1966). Second, it would appear more feasible and practicable to adopt the approach contended for by BLE. It would reduce turmoil. On the other hand, the view expressed by the United States may tend toward multiplicity of litigation.

CONCLUSION.

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

NUMBER OF ENGINEERS SUBJECT TO EBB AND FLOW PROCESS BY SELECTED RAILROADS—YEAR 1966

(Coughlin Affidavit, Appendix 18.)

Railroad	Working Engineers	Demoted Engineers	Total Engineers	Ebb and Flow Number	Ebb and Flow Percent of Total
Illinois Central RR	257	127	384	127	33.1
St Louis-Southwestern	246	2	248	14	5.6
Southern Pacific (T&L)	118	57	175	16	9.1
Southern Pacific (Pac)	2,269	646	2,915	402	13.8
Great Northern RR	250	123	373	95	25.5
Atlantic Coast Line RR	980	13	993	161	16.2
Total	4,120	968	5,088	815	16.02
A T & S F, Proper	557	299	856	277	25.4
Norfolk & Western (Pocah Reg)	414	204	618	67	10.8
Seaboard Airline	671	277	948	277	29.2
Union Pacific (East)	985	312	1,297	180	13.9
Northern Pacific RR	302	166	468	100	21.4
Total	2,929	1,258	4,187	901	21.5
Grand Total	7,049	2,226	9,275	1,716	18.5

APPENDIX B.

LOCOMOTIVE ENGINEERS AND FIREMEN CLASS I RAILROADS—UNITED STATES

(Coughlin Affidavit, Appendix 5.)

Year	Engineers Pass	Thru Frt	L&W Frt	Yard	Total	Firemen Pass	Thru Frt	L&W Frt	Yard	Total
1935	8,884	12,415	6,569	12,514	40,382	8,102	14,947	7,275	13,818	44,142
1940	8,686	13,504	6,781	14,281	43,252	7,941	15,550	7,255	15,444	46,190
1945	10,366	21,424	8,006	19,877	59,673	9,532	23,331	8,369	21,027	62,259
1950	8,239	15,082	7,528	18,346	49,195	7,490	16,646	7,833	19,206	51,175
1955	6,849	12,015	6,883	18,279	44,026	6,172	13,053	7,005	19,213	45,443
1960	4,841	9,561	6,012	15,803	36,217	4,325	10,309	6,162	17,969	38,765
1961	4,558	8,866	5,705	14,967	34,096	4,116	9,628	5,833	17,039	36,616
1962	4,422	9,036	5,739	15,049	34,246	3,979	9,826	5,799	16,918	36,522
1963	4,350	8,926	5,862	14,788	33,926	3,828	9,590	5,905	16,546	35,869
1964	4,212	9,364	5,864	14,867	34,307	3,652	8,501	4,809	13,002	29,964
1965	4,006	9,896	5,968	15,251	35,121	3,426	6,507	3,295	8,540	21,768

Source: ICC M-300 Annual Statements, Mid-Mo Count.

APPENDIX C.

AFFIDAVIT OF E. E. WATSON.

(Coughlin Affidavit, Appendix 9.)

E. E. WATSON, being duly sworn, deposes and says:

(1) I am E. E. Watson, General Chairman, General Committee of Adjustment, Brotherhood of Locomotive Engineers, Terminal Railroad Association of St. Louis, Chicago and North Western Railway (L. & M. District), Manufacturers Railway, Illinois Terminal Railroad. Previous to my being elected as the duly authorized representative chairman for all locomotive engineers employed by the Terminal Railroad Association of St. Louis and the Chicago and North Western Railway (L. & M. District) I held various local offices in the Brotherhood of Locomotive Engineers and was employed by the Terminal Railroad Association of St. Louis as a locomotive fireman for a period of two years and fifteen days, this period being December 24, 1950 to and including January 7, 1953. I was employed as an engineer from January 8, 1953 to January 11, 1962, a period of nine years. I am on leave of absence from the Terminal Railroad Association of St. Louis and retain seniority rights on this railroad. I was elected General Chairman on January 12, 1962 and have served in this capacity since that date. This General Committee maintains their office at 601 Buder Building, Seven North Seventh Street in St. Louis, Missouri. My following statement is directed and pertains to only the conditions on the Terminal Railroad Association of St. Louis where the preponderance of this General Committee's constituents are employed.

(2) The General Committee of Adjustment, Brotherhood of Locomotive Engineers is the duly designated and authorized bargaining representative, as provided by the

Railway Labor Act, for the craft of locomotive engineers on the Terminal Railroad Association of St. Louis. This statement is further attested to by the numerous agreements or contracts, many of them the National Mediation Board being a party thereto. This General Committee's designated and authorized representation of locomotive engineers has not been contested. There are three-hundred-eighteen (318) locomotive engineers listed on the seniority roster which governs the senority of engineers for the entire Terminal property.

(3) At the present time there are no locomotive firemen employed on the Terminal Railroad Association of St. Louis who can be promoted to the craft of locomotive engineer. The firemen employed by this Carrier, through agreement, have waived all rights for promotion to the craft of locomotive engineer and the future needs for locomotive engineers by the Carrier must be obtained outside the ranks of the presently employed locomotive firemen. Therefore, there not being any locomotive firemen available for immediate employment as locomotive engineers on this property, the Carrier must go outside the ranks of locomotive firemen to obtain engineers.

(4) Under the rules providing for the hiring of engineers there are no restrictions requiring the Carrier to hire experienced individuals for employment as engineers. The Carrier, to this date, has hired a total of thirty-three (33) employees for the purpose of working in the craft of locomotive engineer. These newly hired employees had some experience in engine service through previous employment on the Terminal Railroad Association of St. Louis. They were severed from Carrier employment as provided by the Award of Arbitration Board 282 due to their having less than ten years of service as provided by

the Award. The majority of those severed had less than five years of service at the time of severance.

(5) These employees, although not having been promoted to the craft of locomotive engineer prior to severance, to a certain degree, made themselves available to the Carrier in order that they might receive a second chance in the railroad industry as a locomotive engineer. In conjunction with their personal knowledge and/or opinion that the Carrier had excessively severed employees and in the very near future would need locomotive engineers, they made themselves available to the Carrier in hopes of being hired and qualified as an engineer account of their previous experience. However, for future requirements the Carrier does not have available to them a supply of experienced people, as they have had in the past, and those remaining with one or two years of previous seniority, severed from employment since 1964, will probably not make themselves available for employment after such an extended period of time. The circumstances stated above not being applicable to the one and two year man at the time of his severance has obtained employment on other railroads or in other industry. In the event the few former employees would return, who had engine service experience and offered such re-employment, they would return to railroad employment with an insufficient amount of experience for employment as a locomotive engineer. The Carrier now resorts to untrained individuals from the public for their future supply of locomotive engineers.

(6) As previously stated, there are no firemen that are promotable due to their structure as "fixture firemen." Therefore these employees never work in the craft of locomotive engineer. There are presently employed by the Terminal Railroad Association sixty-two (62) "fixture firemen" for the purpose of employment on approximately

twenty-three (23) veto firemen assignments which have been provided by the Award of Arbitration Board 282. The thirty-three (33) hired engineers are not subject to an ebb-and-flow between the crafts of locomotive engineer and locomotive firemen. When the necessities of the service do not require the use of the hired locomotive engineer, account of his junior standing on the seniority roster and a Carrier's recession in business, he is not permitted to work in the craft of locomotive fireman or in any other craft. This, of course, is due to the number of excess "fixture firemen" employed thus preventing the hired engineer assuming work opportunity (23 veto firemen assignments) in the firemen craft. Provisions flowing from the Award of Arbitration Board 282 have given the hired engineer on this property several opportunities while creating a potential engineer shortage at some future date by their failure of returning to employment after having been furloughed and obtaining more stabilized employment elsewhere. This statement is not made for the purpose of humor or insolence but only to demonstrate that the hired engineer is not subject to the ebb-and-flow condition as previously existed on this property and the only opportunity now available when not working as a locomotive engineer is to: (1) Look for another job until called to return to work as an engineer, or, (2) receive Railroad Unemployment Benefits if qualified.

(7) The engineers who were promoted have a standing above the thirty-three (33) hired engineers on the seniority roster and they are not subjected to an ebb-and-flow account of their senior standings on said list.

(8) Some of the referred to "fixture firemen" desired to be promoted to the craft of locomotive engineer. These firemen inasmuch as they had previously declined the opportunity to become locomotive engineers were prevented

from accepting such an opportunity again. This General Committee was not a party in preventing these firemen the opportunity of becoming an engineer.

(9) Due to the Carrier having an excessive amount of "fixture firemen" they have not hired additional firemen for the purpose of training as engineers. At this time, vacation periods are at a minimum and under the existing agreements this alone will cause a shortage of locomotive engineers in the very near future (within four months). If the Carrier has an increased volume of business above the present level they have no engineers available to handle such increase. If the Carrier's business volume remains the same, as of this date, there will be a shortage of sixteen (16) engineers on May 15, 1967, and twenty (20) engineers on May 22, 1967. This shortage of engineers, under present business volume, will continue for the remainder of the year 1967 and continue throughout the coming years. We need not mention other factors outside the scheduled vacations to indicate the immediate need for the training of locomotive engineers on the Terminal Railroad Association of St. Louis.

(10) This General Committee, in light of the future needs of the locomotive engineer craft, is endeavoring to establish a training program for this purpose. There have been several conferences held with the Terminal Management regarding this matter. We have not served a formal notice as provided by the Railway Labor Act account of the Carrier's willingness to discuss the matter and subsequently investigating programs regarding the type of training advocated by this Committee in conference which will be mandatory for their future employees in the craft of locomotive engineer.

E. E. WATSON.

Sworn to before me and subscribed in my presence this 2nd day of February, 1967.

LORETTA COX,
Notary Public,
My Commission Expires Oct. 22, 1970.